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Supreme Court of the United States.

OCTOBER TERM, 1882.

John B. Gibson, Appellant,

No. 1081. —— vs. ——

Charlotte Bruce, Appellee.

BRIEF FOR APPELLANT.

THOS. McDOUGALL, and
HOADLY, JOHNSON & COLSTON,
Solicitors for John B. Gibson, Appellant.

1882:
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BRIEF FOR APPELLANT.

This cause comes into this Court on appeal from the Circuit Court of the Southern District of Ohio, Western Division.

Appellant seeks the review and reversal of an order of that Court, remanding this cause to the Superior Court of Cincinnati, Ohio.

The cause was removed from said Superior Court into the Circuit Court by appellant.

The Circuit Court ordered the cause remanded to the Superior Court on the motion of the appellee, and on her plea in abatement, which motion was as follows:

"MOTION TO REMAND.

Now comes the plaintiff, Charlotte Bruce, and moves the Court that this cause which was removed upon the application of the defendant, from the Superior Court of Cincinnati, Ohio, to this Court, be remanded to the said Superior Court of Cincinnati, for the reason that this Court has no jurisdiction of said cause, because the said plaintiff and the said defendant are now, and were at the time of the application for said removal, both citizens of the said State of Ohio.

O'CONNOR, GLIDDEN & BURGOYNE, and
T. D. LINCOLN,
Attorneys for Plaintiff."

The only ground set forth in the motion of appellee for the remanding of said cause, and the only question or issue raised by the plea in abatement, and the only ground on which it was remanded, and therefore the only question presented by the record for this Court to review, it being the only one appealed from; and there being no cross-appeal, is:

"*That the said plaintiff and the said defendant are now (the time of filing the motion to remand), and were at the time of the application for said removal (from the State to the Circuit Court), both citizens of the State of Ohio.*"

Was the Circuit Court under the act of March 3, 1875, right in remanding the cause for the above reason; if not, then its judgment should be reversed, and the cause proceed to trial in that Court.

Appellant claims that the Circuit Court erred in remanding the cause; erred in deciding that the Circuit Court

had no jurisdiction of the same, "*because at the time of filing the petition for removal, appellee and appellant were citizens of the same State*," when it was admitted, as set forth in the petition for removal, and found by the Circuit Court on the trial, that at the time the suit was brought in the State Court, and for many months thereafter, appellee was a citizen of the State of New York, and appellant a citizen of the State of Ohio.

The petition of appellant for the removal of the cause from the State Court, was in proper form and accompanied by the necessary bond.

The allegations in that petition as to citizenship, were as follows:

"That the controversy in this suit is between citizens of different States, and is in the nature of a civil action at law or in equity.

That the plaintiff, Charlotte Bruce, was, at the time of the commencement of this suit, and since has been, and still is, a citizen of the State of New York; and that defendant, John B. Gibson, your petitioner, was, at the time of the bringing of this suit, ever since has been, and still is, a citizen of the State of Ohio."

Appellee in her motion to remand and by her plea in abatement to the jurisdiction, admitted the allegation in the petition for removal to be true, "that at the time of the commencement of the suit she was a citizen of the State of New York, and appellant was a citizen of the State of Ohio." The controversy at that time—the time the suit was brought—was therefore one between citizens of different States.

The State Court ordered the removal of the cause to the Circuit Court, after a hearing, appellee having filed an answer to the petition for removal and joined issue.

The State Court, in its order for the removal of the cause, found:

"That the said petition for removal and said bond were filed at the term of that Court at which the cause could be first tried and before the trial thereof."

To this finding appellee took no exception; and, in the Circuit Court appellee did not file a motion, or otherwise seek to remand the cause, on the ground that the petition for removal was not filed, at or before the term of the State Court at which the cause could be first tried, and before the trial thereof.

Appellant submits that no such question can be raised here, and that no such question is presented by this record for review.

No motion to remand the cause on such ground has ever been filed. We will however hereafter discuss that question. We proceed now to discuss the only question, which seems to us, to be presented by the record, for the consideration of this reviewing Court.

ARGUMENT.

I.

WHEN THE SUIT WAS BROUGHT IN THE STATE COURT THE PLAINTIFF THEREIN (APPELLEE) WAS A CITIZEN OF THE STATE OF NEW YORK, AND THE DEFENDANT THEREIN (APPELLANT) WAS A CITIZEN OF THE STATE OF OHIO.

Did this give appellant the right to remove the cause to the Circuit Court of the United States under the act of March 3, 1875; provided, he elected to exercise that right in time, (*i. e.*, at or before the term at which the cause could be first tried, and before the trial thereof.)?

Appellant claims it did. He claims that an averment in the petition for removal under the act of March 3, 1875, as under the act of 1789,

"*That at the time the suit was brought plaintiff was a citizen of one State and defendant of another State,*"

is sufficient, and that his right to the removal of the cause cannot be defeated by the change of citizenship of the other party, "AFTER" suit is brought. The Circuit Court held that it might thus be defeated, that it was defeated in this case, for that and no other reason, and decided, that under the act of March 3, 1875, it is essential that the requisite citizenship exist, at the time the petition for removal is filed.

This construction of the act of 1875, is a radical departure from the settled construction given to the act of 1789, by this Court, in a long line of decisions ending with

Insurance Company vs. Pechner, 95 U. S., 183.

On page 185, the Court say:

"The application for removal in this case was made under section 12, of the Judiciary Act of 1789, 1 Stat., 79. That section, so far as it is important for the determination of this case, reads as follows:

"If a suit be commenced in any State Court, * * by a citizen of the State in which the suit is brought against a citizen of another State, * * * and the defendant shall, at the time of entering his appearance in such State Court, file a petition for the removal of the cause for trial into the next Circuit Court, * * * it shall then be the duty of the State Court, * * * to proceed no farther in the cause."

Clearly this has reference to the citizenship of the parties when the suit is begun; for the language is, "if a suit be commenced by a citizen of the State in which the suit is brought against a citizen of another State, the defendant may, *when he enters his appearance*, petition for its removal."

The phraseology employed, in the acts of 1866, 14 Stat., 307, 1867 id., 558, and 1875, 18 id., 470, and in the Revised Statutes, section 639, is somewhat different, and we are not now called upon to give a construction to the language there used. As to the act of 1789, we entertain no doubt in this particular."

It is well to note here that this Court has settled as to the act of 1789, that it is not the citizenship existing at the time of entering appearance in the State Court, and filing the petition for removal, which determines the right to remove, and establishes the jurisdiction of the Federal Courts.

"It is the time of beginning the suit," the time the suit is brought or commenced that fixes the right to remove and establishes the jurisdiction.

Under the act of 1789 it was only necessary to aver in the petition for removal, to entitle the petitioner to remove, and thus to give the Circuit Court jurisdiction, "that the requisite citizenship existed at the time the suit was brought or commenced."

The proof was confined to that time. No other issue could be raised under that act.

The right to remove, under the act of 1789, could not be defeated by a plea to the jurisdiction, setting forth that at the time the plea was filed, or at the time the petition to remove was filed, the parties were citizens of the same State. Such a plea was filed under that act in the case of

Mollan vs. Torrance, 9 Wheaton, 537.

On page 539, this Court say:

"The defendant has filed a plea to the jurisdiction of the Court, in which he states, * * * that the said H. J. Lowrie and the defendants are both citizens of the State of Mississippi. * * *

The plaintiffs contend the plea is defective, because it avers that the said H. J. Lowrie and the defendant are both citizens of the State of Mississippi at the time of the plea pleaded, not that they were citizens of the said State at the time the action was brought.

It is quite clear, the jurisdiction of the Court depends upon the state of things at the time of the action brought, and that after vesting, it cannot be ousted by subsequent events. Since then one of the counts shows jurisdiction, and the plea does not contain sufficient matter to deny that jurisdiction, we think the judgment ought not to have been rendered on the demurrer in favor of defendant."

This case settled, early in the history of the Federal Courts, the construction of the act of 1789. It determined that the jurisdictional averment, issue, inquiry and proof of citizenship must be confined to the status of the parties at the time of bringing the suit, and not extended to the date of filing the petition for removal. The rights of the parties as to *time* were then (when suit was brought) determined, and could not be changed or defeated by after events. Pertinent to this, as to the *time* and rights of the parties is the case of

Holden vs. Putnam Ins. Co., 46 New York, 1.

The Court of Appeals, on page 6, say:

"The rights of the parties, under this statute, (removal act of 1789,) are governed by the facts existing at the com-

mencement of the suit, and a subsequent change of residence or citizenship does not confer or defeat a right to proceed under it."

Again, in the case of

Burdick vs. Peterson, 6 Federal Reporter, 841, the

Court (Circuit Judge McCrary,) say, and this in reference to the act of 1875:

"This Court has several times held, that the petition for removal, or the record of the cause in the State Court, under the act of 1875, must show the citizenship of the parties at the time of the commencement of the suit.

If he (the party petitioning to remove) had the right to remove at all, it was manifestly sufficient to aver the citizenship of the parties at the time that right accrued, that is to say at the time he became a party to the suit."

We ask, if the only averment necessary, is of the citizenship of the parties at the time the suit is brought, can the issue by plea in abatement to the jurisdiction, or by motion to remand, even if that were the proper proceeding, be made broader or wider than the averment, and is the petitioner for removal compelled to aver and prove, in order to maintain his right of removal, that the requisite citizenship has continued from the time of bringing the suit until the filing of the petition for removal; or, to follow strictly the logic of the decision of the Circuit Court in the cause at bar, until the transcript of the record in the State Court has been docketed in the Circuit Court?

It certainly cannot be necessary to do this. It was not necessary, it was not permissible under the act of 1789.

And yet it must often have occurred, in cases removed under the act of 1789, that, whereas the requisite citizenship existed at the time the suit was brought, the parties had become citizens of the same State, before the defendant entered his appearance in the State Court, and filed his petition therein for the removal of the cause.

This would not have defeated the defendant's right of removal under that act. No such plea of subsequently acquired citizenship, would or could have been entertained, to defeat the party's right of removal and the jurisdiction of the Federal Court. The averment, the issue, the proof, the inquiry was confined, under the act of 1789, to the status of citizenship at the time the suit was brought. This determined the rights of the parties and the jurisdiction of the Court. Those rights, once vested in a party to the suit, could not be divested by any change of residence or citizenship, or conduct of the opposing party. This has been the settled construction of the language of the act of 1789, and the rights of parties, and the jurisdiction of the Federal Courts thereunder for nearly a century, and has also been theconstruction, given to the language of that act, by many of the highest Courts of the States.

Shall this construction be reversed as to the act of 1875?

Is there anything in the language or phraseology of that act, or its purpose as gathered therefrom, to merit such a radical and dangerous departure, from such a well settled rule of construction?

Is it reasonable to adopt a rule that will enable any party to a suit to defeat the opposing party's right to remove, even up to the very day on which, with petition to remove and bond, he might walk to the State Court, to exercise a right conferred on him by the Constitution and laws of the United States; and which right existed at the time the suit was brought, and until the day before the petition to remove is filed?

Citizenship may be acquired in an hour; it may be changed in an hour; the change is almost, if not altogether, an instantaneous act.

It is well settled by this Court, that it may be acquired for the very purpose of giving jurisdiction to the Federal Courts; it may, therefore, be changed in order to prevent jurisdiction being acquired by them.

To say therefore, that the right to remove a cause existing at the time the suit is brought, may be defeated, taken away from the party in whom it is vested, and who is seeking to exercise it within the time granted him by the statute for doing so, by a change of citizenship of his opponent, before that time has expired, before the petition for removal is filed, and which change that opponent may make on purpose to take away that right, is to introduce, as we have said, a dangerous rule of construction; and is a radical departure from the well settled practice under the act of 1789.

His Honor, Mr. Justice Bradley, in the case of *Houser vs. Clayton*, 3 Woods, C. Ct., 273,

speaking on this subject, and in reference to a case presenting the same question as in this case, and under the act of 1875, says, on page 277:

"It is convenient to have some fixed and definite time. The commencement of the suit is the most convenient and reasonable time. If a subsequent time were fixed, it would involve a necessary shifting and changing of jurisdiction. We shall adhere to the old rule as within the intendment of the present law, until some other rule shall be adopted by the Superior Court."

In a recent and well considered case before the Supreme Court of Massachusetts, decided while his Honor, Mr. Justice Gray was a member of the Court, the act of 1867, similar in language to that of 1875, was considered

Tapley vs. Martin, 116 Mass. 275.

On page 276, the Court say:

"The first exception is to the ruling of the Court that the defendant was not entitled to remove the suit to the Circuit Court of the United States. At the time the suit was brought both parties were citizens of this State. The defendant afterward removed to Maryland. The statute provides that where a suit "may hereafter be brought in any State Court, in which there is controversy between a citizen of the State in which the suit is brought and a citizen of another State," such citizen of another State may, at any time before the final hearing or trial of the suit, remove the suit to the Circuit Court of the United States, in the manner pointed out in the statute. U. S. Stat. of 1867, C. 196. *We are of opinion that this statute applies only to cases where at the time the suit is brought, one of the parties is a citizen of another State than that in which it is brought.* Any other construction would enable either party to all suits in the State Courts to defeat the jurisdiction of the Court, at his own option by removing into another State. This was not the purpose or intention of the statute and the fair con-

struction of its language does not lead to such a result. We are therefore of opinion, that the rule excepted to was correct."

And yet the language and reasoning of Judge Baxter, in the opinion announced by him in this case, is in direct conflict with this opinion. He says the citizenship at the time the suit is brought has nothing whatever to do with the right of removal; it is the citizenship when the petition for removal is filed that determines; nay, rather the time when the suit is entered in the Federal Court. He further said that no other construction was consistent with the Constitution of the United States.

Under his construction of the act of 1875, as applied in the case at bar;—its language in the question involved in this case being the same as that of 1867—the Supreme Court of Massachusetts would have been compelled to decide *Tapley vs. Martin*, other than it was decided, and to have sustained instead of denying as they did, the right of removal.

Kaeiser vs. Ill. Cent. R. R. Co., 6 Federal Reporter 1, was decided by Circuit Judge McCrary, his Honor Mr. Justice Miller, concurring.

We quote on page 3.

"It was settled by the *Insurance Company vs. Pechner*, 95 U. S. 183, that under the twelfth section of the judiciary act of 1789, embodied in section 639 of the Revised Statutes, a cause cannot be removed from a State to a Federal Court, unless the petition for removal affirmatively shows that, at the time of the commencement of the suit, the parties were citizens of different States."

On the same page the Court say:

"Under the act above cited, the fact of the citizenship of the parties at the time of the commencement of the suit, is jurisdictional, and must in every case appear of record."

And on page 5 the Court, after comparing the language of the acts of 1789 and 1875, say:

"The meaning in both cases is, that the controversy must be between the citizens of different States when the suit is commenced or brought. It follows that under the act of 1875, as well as under the previous law, a case cannot be removed from a State to a Federal Court, on the ground of citizenship of the parties, unless it appears from the record that at the time the suit was commenced, the parties were citizens of different States; and as this does not appear from the record in this case, the removal was unauthorized and this Court has no jurisdiction.

The foregoing cases would seem to settle beyond question appellant's right to have removed this cause under the act of 1789. Under that act the judgment of the Circuit Court in this case would be reversed.

Under that act it never was contended that the party seeking to remove the cause, should aver and prove anything else, than that the parties were citizens of different States, at the time the suit was brought.

It never was held, that they must, in addition to being citizens of different States at the time suit was brought, be citizens of different States at the time the party seeking to remove, entered his appearance in the State Court and filed his petition for removal.

And yet, unless such different citizenship existed at the time the petition for removal was filed, even under the act of 1789, according to the reasoning of Judge Baxter in this case, no such right of removal existed; and even if Congress had attempted to confer jurisdiction on the Federal Courts, by reason of the parties to the suit being citizens of different States when suit was brought, when they had become citizens of the same State before the petition for removal was filed, such legislation would be unconstitutional and void.

The reasons of Judge Baxter, given in his opinion in this case, are as fatal to the right of removal under the act of 1789, as that of 1875.

They are a direct reversal of the settled rule of construction of the right of removal under the act of 1789, as held by this Court for nearly a century.

These reasons and that opinion say to this Court: when you settled that the Federal Courts had a right to entertain jurisdiction of a case brought in a State Court and removed to the Federal Court, under the act of 1789, when the parties had the requisite citizenship at the time the suit was brought, and did not say that such requisite citizenship must have existed at the time the petition for removal was filed, you were usurping the powers belonging to the States, and arrogating to yourselves a jurisdiction that did not belong to you.

For, has not Judge Baxter said, that, unless at the time the petition for removal is filed, the parties are citizens of

different States, the Federal Courts have no jurisdiction and can acquire none, and Congress can confer none, as the Constitution of the United States gives no such right.

If, then, Judge Baxter is right, that "*the*" time is when the petition for removal is filed, "*that*" and no other time; (and there certainly cannot be two or more times of fixing the status, the right,) if this one is the essential jurisdictional time, what matters the citizenship when the suit is brought in the State Court? No right can be acquired, no jurisdiction given the Federal Court then, unless the petition for removal is filed simultaneously with the petition or complaint of the party bringing the suit, at the time suit is brought. For more than seventy-five years this Court has fixed a time, for the right of removal and establishing the jurisdiction of the Federal Courts; which, according to Judge Baxter, confers no right, establishes no jurisdiction, and is unconstitutional.

Has any such change been made by the act of March 3, 1875, as to defeat appellant's right of removal, and justify the decision of the Circuit Court in this case? Let us examine this question next; and see if the rule so long settled as to the act of 1789 ought to be now radically changed.

II.

THE ACTS OF 1789 AND 1875 COMPARED.

We can best introduce this branch of our argument by quoting at length from the case of

Kaeiser vs. Ill. Cent. R. R. Co., 6 Fed. Rep. 1.

The Circuit Court say:

"We will therefore consider the application as made under the act of March 3, 1875, which permits a removal upon the application of either party. Does this act, like section 639 of the Revised Statutes require that the record shall disclose, the citizenship of the parties at the time of the commencement of the suit.

The two statutes so far as they bear upon this question are not identical in phraseology, but are I think substantially identical in meaning.

The language of the former is, "any suit commenced in any State Court * * * may be removed for trial * * * when the suit is * * * by a citizen of the State wherein it is brought, and against a citizen of another State."

The language of the latter is "any suit of a civil nature, at law or in equity now pending or hereafter brought *

* * in which there shall be a controversy between citizens of different States * * * either party may remove."

The words "*any suit commenced*" in the former act, which have been held by the Supreme Court to fix the time at which it must appear that the parties were citizens of different States, are identical in meaning with the words "*hereafter brought*" in the act of 1875. The phrases "*any suit commenced*" and "any suit brought," mean precisely the same thing. * * *

The meaning in both cases is that the controversy must be between citizens of different States when the suit is commenced or brought. It follows that under the act of 1875 as well as under the previous law, a case cannot be removed from a State to a Federal Court on the ground of citizenship of the parties, unless it appears from the record, that at the time the suit was commenced the parties to it were citizens of different States." * * *

Miller, C. J., concurs.

This able opinion concurred in by his Honor Mr. Justice Miller, would seem to settle the meaning of the language of the two acts.

Again, the same Circuit Judge, in the case of

Beede vs. Cheeney et al., 5 Federal Reporter 388.

On page 389, says:

"The petition for the removal of the cause into this Court is in the present tense. It states that defendants are residents of another State.

Under the judiciary act of 1789, the Supreme Court has held that the record must show the citizenship of the parties at the time of the commencement of the action.

In a case recently decided in St. Louis, where Justice Miller was present in Court, it was held that the same rule

prevails under the act of 1875, and that the petition for removal under that act must also show the citizenship of the parties at the time of the commencement of the action, and not at the time of the application for removal."

One of the earliest and best considered cases arising under the act of 1875, and in which its language was compared with the language in the act of 1789, was the case of *Rawle vs. Phelps*, 9 Central Law Journal 46.

This case presents such a full statement of the effect of the act of 1875 on the rights of the parties that we may be pardoned for quoting from it at length, as to the question presented in this case, viz: "The time of citizenship," it clearly determines that the two acts are alike, and that this Court's settled rule of construction of the act of 1789, should be applied to the act of 1875.

The Court (Judge Brown), say:

"So far as cases originating in Federal Courts are concerned, it is perfectly well settled that the requisite of citizenship must exist at the commencement of the suit, and that the subsequent removal of the non-resident party to the State where the suit is pending will not oust the jurisdiction. *Morgan's Heirs vs. Morgan*, 2 Wheat 290; *Mollan vs. Torrance*, 9 Id. 537. Such being the general policy of the law, it would seem by parity of reasoning, that where both parties are citizens of the same State at the time the suit is commenced, the subsequent removal of one of them to another jurisdiction ought not to change the "*status*" of the case, or confer a right of transfer to the Federal Court; at least such construction ought not to be given unless the words of the statute are clear and explicit. A reversal of a policy adopted at the foundation of the government, and continued for seventy five years, ought not to be inferred from doubtful or ambiguous words. The observations of Mr. Justice Miller, in

Johnson vs. Monell, 1 Wool. 390, 394, are pertinent here; "This is such a wide departure from the restrictions by which Congress had heretofore guarded the right of removal, and the proposition that a party instituting the litigation in a State Court, and pressing it to the point here mentioned, can, by his own voluntary change of residence, acquire the right to remove the case from the forum of his own selection, is so startling, that nothing short of the clearest evidence that Congress had both the power and the intention to grant such a right, will justify the procedure.

Under the act of 1789 it was held, in *Insurance Co. vs. Pechner*, 95 U. S. 183, 6 Cent. L. J. 70, that the petition for removal must show affirmatively that the plaintiff was a citizen of another State at the time the suit was commenced * * * a careful examination of the language of the two acts satisfies me that there is no substantial difference between them. The act of 1789 provided that "if a suit be commenced * * * by a citizen of the State in which the suit is brought against a citizen of another State * * * and the defendant shall at the time of entering his appearance in such State Court file a petition, etc. The act of 1875 provides that "any suit," etc., now pending or hereafter brought in any State Court where the matter in dispute exceeds * * * the sum of $500; and * * * in which there shall be a controversy between citizens of different States, etc., either party may remove. There is certainly no distinction between the words "commenced" and "brought." The use of the word "exceeds" in the present tense, obviously refers to the time the action is brought. The words "shall be a controversy," are somewhat equivocal, but I think they should be regarded, as controlled by the previous word "exceeds," and should be construed in connection with it. There would be no reason for holding that the jurisdictional test as to amount should be applied to the time when the suit is begun, and the test as to citizenship to a subsequent time. The fact that the statute of 1875, as well as those of 1866 and 1867, extends the time within which the petition may be filed, proves nothing as to the time when the requisite citizenship should exist. If it did, then the Supreme Court should have decided in the Pechner case, that it was sufficient if the petition

showed the defendant to be a non-resident corporation at the time of entering its appearance in the State Court. * * *

I do not regard the decision in the case of *Johnson vs. Monell*, 1 Wool. 390, as necessarily inconsistent with these authorities. * * * The plaintiff might have begun his suit originally in the Federal Court, and under all the authorities, his subsequent removal to the State where it was pending would not have ousted the jurisdiction. "*This being so, I see no reason why, if he had been a citizen of another State when the suit was begun in the State Court, he might not have removed it to the Federal Courts, even though at the time of his petition for removal he was a citizen of the State where the suit was pending.*"

We note here as to this opinion, that the latter part of the citation therefrom, is exactly what we claim should have been decided in this case; and if adopted by this Court, will secure a reversal of the order appealed from. And further, that the rule laid down in the case at bar by Judge Baxter, would lead to and justify the very evils set forth in the first part of this opinion.

We quote at length from the opinion of his Honor Mr. Justice Bradley, in *Houser vs. Clayton*, 3 Woods, *supra*. The case presents the exact question in dispute in this case; and lays down the rule of construction under the act of 1875, as to the status and time of citizenship, which fixes the rights of parties, and the jurisdiction of the Federal Courts with great clearness, and is as follows:

"The second ground of removal, namely, the alienage of the plaintiff and the Texas citizenship of the defendants, (which also arises under the second section of the act of 1875,) is also sufficiently alleged in the petition. It is true, the petition only alleges that the plaintiff was an alien when he filed his suit in the District Court for Galveston County,

and does not allege that he still remained an alien at the time for filing the amended petition for removal. But we think the allegation was sufficient. It was lately decided by the Supreme Court, in the case of *Insurance Company vs. Pechner*, 95 U. S., 183, that under the judiciary act of 1789, the requisite citizenship for the removal of a cause from a State Court to a Federal Court, must exist at the commencement of the suit in the State Court. It is true, the Court drew its conclusion from the language of the 12th section of the judiciary act, which was "that if a suit be *commenced* in any State Court by a citizen of the State against a citizen of another State," etc., then the cause might be removed; and the language of the act of 1875 is different, and is not so explicit on this point. But we think that the intent of the act is the same. Its language is: "that any suit of a civil nature, at law or in equity, now pending or hereafter *brought* in any State Court, * * * in which there shall be a controversy between citizens of a State and foreign States, citizens or subjects, etc., either party may remove said suit," etc. The description here given of a suit that may be removed, embraces a suit in which the parties have the requisite citizenship or alienage at the time of its commencement, and as that was the time fixed by the previous law, for ascertaining this condition or status of the parties, it may very properly be construed to be the time intended by the present law for the same purpose. It is convenient to have some fixed and definite time. The commencement of the suit is the most convenient and reasonable time. If a subsequent time were fixed, it would involve a necessary shifting and changing of jurisdiction. We shall adhere to the old rule, as within the intendment of the present law, until some other rule shall be adopted by the Superior Court."

In the above case, it appears from the record, that the plaintiff and defendant were, at the time the amended petition for removal was filed in the State Court, citizens of the same State, though at the time the suit was brought, plaintiff was an alien, and the defendant removing the cause was a citizen of the State of Texas.

Still his Honor, Mr. Justice Bradley, held that the change of citizenship, made after the suit was begun, "*and before the petition to remove the cause was filed in the State Court*," did not deprive the defendant of his right to remove and the Federal Court of jurisdiction; the requisite citizenship having existed when the suit was brought. Even though at the time the amended petition for removal was filed, both parties were citizens of the State, in which the suit was brought, as in the case at bar.

This case disposes of the only question now before this Court;—the only question presented for review by this record;—it is exactly like this case, and covers and decides the question here involved.

The reasons so ably stated by Mr. Justice Bradley, and in the other decisions we have cited, seem to us to dispose of the only question in this case, and call for the reversal of the order of the lower Court, in remanding this cause to the State Court for trial.

The whole force and effect of these decisions would be destroyed, if the rule of construction announced by Judge Baxter in this case were adopted.

Such a rule, fixing the time when the petition for removal is filed, would allow a party to experiment with the State Court, and then by change of citizenship remove his cause to the Federal Court. For as we have already stated, a party may change his citizenship, for the very purpose of acquiring or defeating jurisdiction; and it is well to remember in all this discussion that under the act of 1875, either

plaintiff or defendant may remove a suit to the Federal Courts.

To quote the language of his Honor, Mr. Justice Bradley, in *Houser vs. Clayton, supra:*

"It would involve a shifting and changing of jurisdiction."

And again, to quote the language of the Supreme Court of Massachusetts, when his Honor, Mr. Justice Gray, was a member of the Court, in

Tapley vs. Martin, supra:

"Any such construction would enable either party to all suits in the State Courts, to defeat the jurisdiction of the Court at his own option, by removing into another State."

It is impossible now, to determine the extent of the evils to which such a departure from the settled rule of construction, adopted as to the act of 1789, would lead, if the rule adopted in the Circuit Court in this case, were made the rule of construction as to the act of 1875. We cannot believe that any such rule as to the status and time of citizenship will be adopted by this Court.

The Supreme Court of Indiana, in a well considered case, in reference to the acts of 1866 and 1867, similar in language to that of 1875, speaking of the evils which would result from the adoption of the rule laid down by the lower Court in this case, say in

The Ind. R. W. Co. vs. Risley. 50 Ind, 64.

"We do not perceive any difference in this respect, between the act of 1789 and the act of 1866 with the amen-

datory act of 1867, which governs the present case. The late act therefore should have no different construction placed upon it, on this point, from that which has so long been settled as the true construction of the act of 1789, 1 U. S. Stat. at Large, 70; 14 U. S. Stat. at Large 396, 558. Indeed the construction that the requisite citizenship should refer to the time of the commencement of the suit is obvious. Otherwise, it would be in the power of either party, by simply changing his domiciliary status, to oust the jurisdiction of a State Court after it had attached, and confer jurisdiction on a Court of the United States, when such jurisdiction did not exist at the time of the commencement of the action. It has often been decided that when jurisdiction once attaches in a Court of the United States, in an action between a resident citizen and a citizen of another State, it cannot be ousted by a change of residence of the parties, though their position after the change may be such as would not have given jurisdiction at the time the suit was commenced; so, we think, when an action has been commenced in a State Court, no state of facts can afterwards be prepared to oust it of its jurisdiction, and remove the cause to a Court of the United States. There is a necessity, then, in both instances in refering the status of the parties to the time when the action is commenced. *Dunn vs. Clark*, 8 Peters 1; *Clarke vs. Matthewson*, 12 Peters 164; *Mollan vs. Torrance*, 9 Wheat 537; *Green vs. Custard*, 23 How. 484."

III.

THE BROADER JURISDICTION.

Appellee has cited in argument the following cases as sustaining or tending to sustain the position taken by the lower Court in this case :

Wehl vs. Wald, 17 Blatch, 346.

McLean vs. The St. Paul & Chi. R. W. Co., 16 Blatch, 317.

Chi., St. Louis & N. O. R. R. Co. vs. McComb, 9 Reporter, 569, 570.

Jackson vs. Mutual. Ins. Co., 3 Woods, 417.

Johnson vs. Monell, 1 Woolw. 397.

Curtin vs. Decker, 5 Fed. Rep., 386.

Jackson vs. The M. L. Ins. Co. of N. Y., 60 Geo., 427.

Nye vs. Northern Cen. R. W. Co., 24 Hun., (N. Y.,) 557.

Dillon on Removal of Causes, Sec. 72, p. 88.

McGinnity vs. White, 3 Dill., 354.

In none of those cases is any such rule laid down as was adopted by the lower Court in this case.

"*In none of them was a cause remanded where the requisite citizenship existed at the time the suit was brought*," or where it existed at any time. One thing is to be noted especially as to the decisions in

Johnson vs. Monell, and

Jackson vs. Mutual Ins. Co.

That is, the tendency to enlarge the jurisdiction of the Federal Courts, in the language of Mr. Justice Miller, applied to the act of 1867, in *Johnson vs. Monell.*

"Where a suit is now pending, or may hereafter be brought, in any such Court in which there is a controversy between a citizen, etc., which is as much as to say, whenever a controversy shall arise in a suit pending in a State Court, the parties to which shall at any time be citizens of different States, the cause may be removed. No time at which the citizenship shall be acquired is limited. So the inference is that it may be acquired at any time."

Again, in the same case, the Court say:

"The conclusion of the Court was that Congress intended to confer the right of removal from the State Court at any stage of the proceedings before the final trial was begun."

Whatever may have been the views of his Honor, Mr. Justice Miller, as to the act of 1867; since rendering the above opinion, he has in *Kaeiser vs. Ill. Central R. R. Co.*, 6 Fed. Rep. 1, already cited and quoted from at length, announced the true rule of construction of the act of 1875, and which is we claim decisive of the question in this case

in favor of appellant, and will insure a reversal of the order appealled from, if adopted by this Court.

In the case of

Jackson vs. Mutual Ins. Co., in 3 Woods, C. C. 417.

His Honor, Mr. Justice Woods, says:

"The act of 1789 did not give to the United States Courts all the jurisdiction authorized by the constitution, either in causes originally commenced in, or cases removed to these Courts.

The clear purpose of the act of 1875, is to extend the jurisdiction of the United States Courts to the full limits warranted by the constitution. The language used in describing the causes that may be removed, is much broader than in the act of 1789. Under the act of 1875, wherever there is controversy between citizens of different States, in any suit pending in a United States Court, the cause may be removed.

Under the act of 1789, the cause could not be removed unless the suit was commenced by a citizen of the State in which the suit was brought against a citizen of another State. The distinction in the language and meaning of the two acts is clear and palpable."

The construction thus sought to be given the act of 1875 by Mr. Justice Woods, is wholly at variance with the rule adopted by the lower Court in this case; which deprives any party of the right to remove, unless they are citizens of different States, at the time the petition for removal is filed.

The rule thus adopted in this case is very narrow, and might result in depriving every party entitled to remove, of the right to remove, by his opponent changing his citizenship after suit begun, for the purpose of depriving him of his right.

The construction adopted by Mr. Justice Woods would give jurisdiction in this case, for in this case, the requisite citizenship did exist when the suit was brought, and while it was pending. There was a time when appellant had a right to remove. He has done nothing to defeat or destroy his right to remove. Is it to be defeated, divested by the act of the appellee in changing her citizenship after suit begun; and which she may have changed for that very purpose?

There is certainly nothing in the decisions of their Honors, Justices Blatchford and Woods, in the cases cited by counsel for appellee, to justify such a rule of construction. These cases only decide, that the necessary citizenship may be acquired, at any time before the term at which the cause could be first tried, and before the trial thereof.

They certainly do not hold, or even tend to support the rule laid down in this case by the Circuit Court; that the necessary citizenship having existed, to entitle a party to remove, he may be deprived of that right; though exercised within the time granted him by the statute in which to exercise it; by the voluntary act of the other party in changing her citizenship the day or the hour before the petition for removal is filed in the State Court; and this is the necessary result of the rule that fixes the time of filing the petition for removal, as the time to determine the rights of the parties to remove.

We have thus discussed at length, and with some repetition, the very important question involved in the present appeal.

The rule of construction to be adopted as to the act of 1875 is one of great consequence to litigants; and will materially affect the jurisdiction of the Federal Courts.

We earnestly contend that the rule adopted under the act of 1789, should not be departed from under the act of 1875. Consistent however with that rule, though perhaps dangerous in its consequences, is the broader rule of allowing the right of removal, if the necessary citizenship exist at any time within which the cause may be removed, viz: at the commencement of the suit and until the term of the Court at which the cause could be first tried, and before the trial thereof. As between the rule adopted under the act of 1789, of fixing the status and determining the right to remove, by the time when suit is brought; and the rule adopted by the lower Court in this cause, of fixing the status and determining the right to remove, by the time of filing the petition to remove, we have no hesitation in saying with his Honor Mr. Justice Bradley, that the old rule, the rule under the act of 1789, is more convenient and reasonable.

It is safer and wiser. If we are not to have the broader rule, which is however not necessary for the reversal of the order appealed from in this case, then we respectfully ask for the old rule; and the reversal of that order.

Counsel for appellee in their printed argument on pages 37 and 38 say:

"Suppose at the time the suit is brought no cause of action is stated, so that on general demurrer judgment must go for the defendant, and that an amended petition is subsequently filed, setting forth a cause of action, but in the meantime the parties had become citizens of the same State.

Could they then remove the case to the Circuit Court of the United States, simply because, when the suit was commenced, they were citizens of different States? See *Gurnee vs. County of Brunswick*, 1 Hughes, 277, 278.

Let us answer by asking another question, supposing as counsel claim and in their own language:

"That the constitution does not give the United States Courts any jurisdiction, (upon the question of parties,) unless, at the time the suit is brought in those Courts, or is brought into them, the same is then a suit between citizens of different States."

Printed argument, page 36.

Suppose at the time the suit is brought in the State Court, both parties are citizens of the "*same*" State; and no cause of action is stated, so that on general demurrer judgment must go for the defendant; and that an amended petition is subsequently filed setting forth a cause of action, but in the meantime the parties have become citizens of different States. The plaintiff changing his citizenship, after defeat in the State Court on demurrer, on purpose to enable him to remove; could they then remove the case to the Circuit Court of the United States, simply because, when the petition for removal was filed, they were citizens of "*different*" States?

Again, on page 37 of the printed argument of counsel for appellee, we have this supposition, as pertinent as the other.

"Suppose Mrs. Bruce had become nonsuited, could she have commenced her suit in the Circuit Court of the United States, at the time of the filing the petition for removal? If

not, how could John B. Gibson commence his suit or bring the suit into that Court?"

We answer: If Mrs. Bruce had been nonsuited, there would not have been any cause to remove. If she had been non-suited and commenced her suit in the Circuit Court of the United States; her right to do so would have depended on the status of the parties to the suit at the *time* her suit was brought.

We come now briefly to consider a question raised and presented at great length, by counsel for appellee in their printed argument.

IV.

THE PETITION TO REMOVE WAS FILED AT TOO LATE A TIME.

We have already said that no such question is presented by the record.

The record shows that the only reason or ground presented to the Circuit Court, asking the cause to be remanded was that of citizenship.

We print here all the objections to the removal of the cause by appellee in the Circuit Court, and all the issues made on the petition to remove, as the same are set forth in the motion of appellee to remand, and her plea in abatement.

The motion to remand is as follows:

"Now comes the plaintiff, Charlotte Bruce, and moves the Court that this cause, which was removed upon the application of the defendant, from the Superior Court of Cincinnati, Ohio, to this Court, be remanded to the said Superior Court of Cincinnati, for the reasons that this Court has no jurisdiction of said cause, because the said plaintiff and said

defendant are now, and were at the time of the application for said removal, both citizens of the said State of Ohio.

O'CONNOR, GLIDDEN & BURGOYNE and T. D. LINCOLN.
Attorneys for Plaintiff."

The plea in abatement is as follows:

"PLEA IN ABATEMENT.

Now comes the plaintiff, Charlotte Bruce, in her proper person, and says that this Court has not, and ought not to take, jurisdiction of this cause, which was brought into this Court from the Superior Court of Cincinnati, Ohio, because she says that at the time of the application in said Superior Court of Cincinnati for the removal of this cause into this Court, and for a long time before said application for said removal, she was and still is a citizen of the city of Cincinnati and State of Ohio, and that the defendant, John B. Gibson, who made said application, for said removal, was, at the time of said application, and before said time, and still is also a citizen of the State of Ohio and of said city of Cincinnati, and this she is ready to verify.

Wherefore the said Charlotte Bruce asks that this cause be remanded to the said, the Superior Court of Cincinnati, to be proceeded in according to law.

CHARLOTTE BRUCE."

It nowhere appears that any objection was made to the removal of the cause, on the ground that the petition for removal was not filed in time in the State Court.

No such objection appears in the motion to remand, and certainly none in the plea in abatement, on which issue was joined, testimony taken, a trial had and a finding of the Court made thereon.

How then, can the objection, that the petition for removal was not filed in time, be now raised, and that in this reviewing Court, by the appellee?

Her failure to raise that objection in the lower Court is a waiver (even if such an objection existed,) of the right to raise it, after affirmative action taken by her in the lower Court.

And she took affirmative action by her plea in abatement to the jurisdiction as above, on which issue of fact a trial was had, testimony offered by the parties and a finding made by the Court.

In any event, such an objection not having been made in the lower Court, where it must be made, cannot be made or raised in this Court.

This Court has decided, that such an objection, if not made in the proper Court at the proper time, is deemed waived.

French vs. Hay, 22 Wall., 244.

Dillon on Removal of Causes, Section 66:

"Where the only objection in the Federal Court to the removal, is '*that the application was not made in the State Court in time*,' this objection may undoubtedly be 'waived' by acquiesence, or even the failure of the other party to make it the ground of an objection to the jurisdiction of the Federal Court in proper time, etc."

When and how did appellee make this objection? Certainly not in the Court below; if so, it does not appear in the record.

Appellee's motion to remand and plea in abatement do not make it. They confine the objection to the jurisdiction, to the one ground of the want of requisite citizenship.

Having named this one objection, and no other, and submitted to a trial in the Circuit Court, and introduced testimony on the issue made on the petition to remove by the plea in abatement and motion to remand, she must be held to have conclusively waived or abandoned every other objection. In any event, she cannot make it now, in this Court. The objection must be made in the Court having original jurisdiction,—the Circuit Court.

It is true, that at any stage of the cause the Court may, on its own motion, take notice of its want of jurisdiction of the subject matter or the parties.

But the time of making the application in the State Court is not such a jurisdictional matter: it neither concerns the subject matter, nor the character of the parties.

It is a matter of procedure, the same as the giving of bond, or the time of docketing the transcript in the Federal Court;—failure to comply with the acts of Congress in these particulars, will defeat the right of removal, if the objection be made at the proper time. If not so made, they are deemed waived, and they may be waived, without involving any question of the jurisdiction of the Federal Courts.

On the other hand, the lack of the requisite citizenship, or the necessary subject matter, cannot be waived, and the Court cannot acquire jurisdiction where either of these is

lacking, even by the consent of parties. But, we repeat, that no such objection was made in the Circuit Court, as the record shows; and it cannot be made now. The only order appealed from in this case, and therefore the only order presented here for review by this Court, under section 5 of the act of March 3rd, 1875, which provides that

"The order of said Circuit Court dismissing or remanding said cause to the State Court, shall be reviewable by the Supreme Court on writ of error or appeal, as the case may be,"

is as follows:

"This cause, coming on to be heard upon the finding of facts in the plea in abatement, filed by plaintiff, and on the motion of plaintiff to remand said cause to the Superior Court of Cincinnati, Ohio, on the ground and for the reason that this Court has no jurisdiction of said cause, because said plaintiff and said defendant were, at the time of filing the said petition of defendant to remove said cause into this Court, citizens of the State of Ohio; and the Court being fully advised in the premises, on consideration whereof the Court grants said motion, and finds that this Court has no jurisdiction of this cause, because said plaintiff and defendant were, at the time said petition to remove said cause was filed, citizens of the State of Ohio; wherefore it is ordered and adjudged by the Court that said cause be, and is hereby remanded to the said Superior Court of Cincinnati, Ohio, and that defendant pay the costs of the proceedings in this Court, to each and all of which defendant, John B. Gibson, excepts; and at the same time said defendant, John B. Gibson, prayed an appeal from this order, judgment or decree, to the Supreme Court of the United States; which appeal, as prayed for, is allowed by the Court, and the Court fixes the amount of the bond, on appeal, in the sum of five hundred ($500.00) dollars."

No order has ever been made remanding this cause, on the ground that the petition for removal was not filed in

time in the State Court; how then, can this Court pass on this question, when it is not presented by the record for review, and no such order has been appealed from?

Much has been said in the printed argument of counsel for appellee, as to the delay in filing the petition for removal; of "other facts against removal" and talk of laches on the part of appellant in removing the cause. The argument abounds in choice language on these grounds, and there is much said of the "*equity*" of removal; as if the right were an equitable right and not a statutory one.

The right of removal is conferred by act of Congress. Are we within the terms, the provisions of that act? If so we are entitled to remove, and are entitled to have our case tried in the Federal Court where we prefer to have the cause tried, even though twenty years had elapsed since the bringing of the suit; and fifty more years might elapse until it is tried.

If not, then we have no right to remove, even if in our effort to exercise that right we had failed from any cause, however equitable, to exercise it. Were the parties to this suit citizens of different States when the suit was brought? If so, (and it is admitted they were such,) then under the act of 1875, as under the act of 1789, had appellant the right of removal. That is the only question here for review.

The fervent appeals to the "equity" side of the right of removal, the statutory right, by reason of the length of time this cause was in the State Court, before removal to

the Federal Court and the length of time, (if this Court reverses the Circuit Court, and remands the cause to that Court for trial) that it will take and the tribulations it must pass through in the way of new pleadings before it is finally disposed of, are not pertinent to the case presented by the record. They might be useful as fireworks before a jury on an issue of fact.

The rule of construction to be applied, to the act of 1875, by the Supreme Court of the United States, as to the time for determining the status of the parties, and the time for removal of causes from the State to the Federal Courts, is not to be determined or affected, by the statement made in the argument of counsel for appellee, "that appellant left this country after service of process and left his lawyers to battle for delay," or "that the Circuit Judge of the Southern District of Ohio is overworked," or "that the same Circuit Judge holds Court in Cleveland and Cincinnati on the same day," or "that a long vista of delay quite interesting to the defendant would be opened, etc., etc. We might multiply," the choice extracts but we forbear.

Sufficient to say, we have appealed to the Federal Courts, and we prefer in the language of this Court in "the Removal Cases," "the Courts which are the Courts of the common country of all the parties;" believing in the language of this Court in the same cases, "that they will as well do equal and exact justice between them as the State Courts could do."

The Federal Courts, in this case, it may be said, will try and finally dispose of this case, on the merits, even to a decision on the merits by the Court of last resort, years before it can be finally disposed of by the Courts of the State of Ohio.

V.

THE PETITION FOR REMOVAL WAS FILED IN TIME.

The State Court found in its order, removing the cause to the Circuit Conrt:

"That the said petition for removal and said bond were filed at the term of that Court, at which the cause could be first tried, and before the trial thereof."

This finding was not excepted to by appellee and stands unreversed. Appellee (plaintiff below,) filed her supplemental petition on the 4th day of March, 1881.

Appellant filed his petition for removal March 8th, 1881, four days later, and at the same term.

No issue has yet been made as to this supplemental petition.

It may be answered. Defendant thereto has a right to defend against it;—it prays judgment against defendant for ten thousand ($10,000.00) dollars, not prayed for in the original or amended petition.

Defendant has the right of set-off or counter-claim thereto, and may plead payment or any other defense.

His time for pleading thereto had not expired, and the cause was not and could not be at issue or tried, before the petition for removal was filed.

In the case of

French vs. Hay, 22 Wall., 246,

this Court say:

"New process is necessary, unless waived upon a supplemental bill and a bill of revivor."

Again the 57th rule in equity of this Court as to supplemental bills provides, that,

"The defendant shall demur, plead, or answer thereto, on the next succeeding rule day."

The decisions and practice clearly show that the cause was not at issue until after time to plead to the supplemental petition, filed March 4, 1881, had expired.

The petition for removal was filed March 8, 1881.

The cases cited by counsel for appellee in argument, as to the power of the Court to grant the relief prayed for in the supplemental petition, on the amended petition, have no application whatever. The prayer in the supplemental petition was for "*a personal judgment*" against defendant, on certain notes which had become due since the filing of the amended petition; no such judgment could have been rendered under a prayer for general relief on the amended petition filed before the notes were due.

The specific relief prayed for in the amended petition, was for the delivery of the notes and judgment on the notes due. It has never been held anywhere, in a suit for foreclosure of a mortgage to secure certain notes, some due at the time of bringing the suit and others not due, that under the prayer for general relief a *personal* judgment might be rendered on the notes maturing after the suit was brought; —in order to do so, process must issue, or appearance be entered to a supplemental bill, and the defendant has the same time and rights as to pleading thereto, which he had to the original bill.

We claim therefore that the petition to remove was filed in time, and that even if it were not, no objection has been made on that ground to the removal of this cause in the lower Court, and the question or objection is no longer open. Certainly it is not before this Court for review.

We respectfully submit that the order of the Circuit Court in this case remanding the cause to the State Court should be reversed.

THOS. McDOUGALL, and
HOADLY, JOHNSON & COLSTON,

Solicitors for John B. Gibson, Appellant.

108-501

SUPREME COURT, U.S.
FILED
APR 21. 1888
JAMES H. McKENNEY, CLERK

Supreme Court of the United States.

JOHN B. GIBSON,

No. 1081. vs.

CHARLOTTE BRUCE.

Advan ct

Motion to Dismiss and Motion to Affirm united therewith.

Now, comes the appellee and defendant in error, Charlotte Bruce, by her counsel, and moves the Court to dismiss the appeal and writ of error, taken by the appellant and plaintiff in error from the United States Circuit Court for the Southern District of Ohio, Western Division thereof, upon the ground that the said Circuit Court had no jurisdiction of the cause for the following reasons:

First. That the petition, to remove the cause to the said Circuit Court, was not filed in the Superior Court of Cincinnati at the first term thereof at which the cause could be tried, and before the the trial thereof, and therefore said petition was too late, and the said Court had no right to remove the said case to the said Circuit Court, or the latter Court to hold it there, and proceed to the hearing thereof.

Second. That the plaintiff and defendant, at the time of the application for the removal of said cause to the Circuit Court aforesaid from the Superior Court of Cincinnati, were citizens of the State of Ohio, and had been such, all the time, for more than seventeen (17) months prior to said application.

And for a brief statement of facts upon which said motion is based the said appellee and defendant in error states,

SUPREME COURT OF THE UNITED STATES.

No. 1081 — JOHN B. GIBSON, vs. CHARLOTTE BRUCE. — *Notice of Motion to Dismiss and Motion to Affirm united therewith.*

Counsel for ~~plaintiff in error~~ appellant, John B. Gibson, will take notice that on Monday, the 8th day of ~~January~~ February, 1883, or if the Court should not be in session or hear motions on that day, then on the first Monday, or day thereafter, when such motions are submitted or heard, the counsel for ~~defendant in error~~ appellee, Charlotte Bruce, will submit a motion to dismiss the appeal and writ of error in this case, and also a motion, united therewith, to affirm, on the ground that although the record may show that this Court has jurisdiction, it is manifest the appeal and writ of error was taken for delay only, and that the question on which the jurisdiction depends is so frivolous as not to need further argument. We hereby notify you that we will agree to submit the case to the Court on printed arguments, under the rule relating thereto. And we now present to and serve upon you a copy of our printed argument which we will use upon the matters aforesaid.

LINCOLN, STEPHENS & SLATTERY,
O'CONNOR, GLIDDEN & BURGOYNE,
Counsel for Defendant.

CINCINNATI, ~~December 18~~ January 13, 1882.

Received a copy of above notice and also of printed argument.

HOADLY, JOHNSON & COLSTON,
THOS. MCDOUGALL,
Counsel for Appellant.

108-361

Supreme Court of the United States

OCTOBER TERM 1882.

JOHN B. GIBSON,

No. 1081. *vs.*

CHARLOTTE BRUCE.

ARGUMENT FOR DEFENDANT.

LINCOLN, STEPHENS & SLATTERY,
O'CONNOR, GLIDDEN & BURGOYNE,
Counsel for Defendant.

SUPREME COURT OF THE UNITED STATES.

No. 1081 — JOHN B. GIBSON, vs. CHARLOTTE BRUCE. — *Notice of Motion to Dismiss and Motion to Affirm united therewith.*

Counsel for ~~plaintiff in error~~, John B. Gibson, will take notice that on Monday, the 8th day of January, 1883, or if the Court should not be in session or hear motions on that day, then on the first Monday, or day thereafter, when such motions are submitted or heard, the counsel for defendant in ~~error~~, Charlotte Bruce, will submit a motion to dismiss the appeal and writ of error in this case, and also a motion, united therewith, to affirm, on the ground that although the record may show that this Court has jurisdiction, it is manifest the appeal and writ of error was taken for delay only, and that the question on which the jurisdiction depends is so frivolous as not to need further argument. We hereby notify you that we will agree to submit the case to the Court on printed arguments, under the rule relating thereto. And we now present to and serve upon you a copy of our printed argument which we will use upon the matters aforesaid.

LINCOLN, STEPHENS & SLATTERY,
O'CONNOR, GLIDDEN & BURGOYNE,
Counsel for Defendant.

CINCINNATI, *December* ~~18~~, 1882.

Received a copy of above notice and also of printed argument.

HOADLY, JOHNSON & COLSTON,
THOS. MCDOUGALL,
Counsel for Appellant.

108-361

Supreme Court of the United States

OCTOBER TERM 1882.

JOHN B. GIBSON,

No. 1081. *VS.*

CHARLOTTE BRUCE.

ARGUMENT FOR DEFENDANT.

LINCOLN, STEPHENS & SLATTERY,
O'CONNOR, GLIDDEN & BURGOYNE,
Counsel for Defendant.

This is a removal case and there are two distinct grounds upon which the motion is made.

FIRST. That fifteen terms of the Superior Court of Cincinnati intervened between the time when the case should have been at issue and might have been heard and the filing of the petition for removal. Nothing that could have taken place in the case can excuse the delay and so prolong the time for removal.

SECOND. That the Circuit Court has specially found upon a trial of that question submitted to it, that at the time when the defendant, in the Superior Court of Cincinnati, filed his petition for removal, he and the plaintiff were both citizens of Ohio and had been for more than seventeen months, and that the statement in the petition for removal upon which it was granted, that the plaintiff was then a citizen of New York, was not true.

The following printed matter and brief was presented to the counsel for the plaintiffs on the 25th of November, and has been before them ever since.

The parties have stipulated that the case be advanced and finally to submit it on the 23d of April, 1883.

IN THE SUPREME COURT OF THE UNITED STATES.

JOHN B. GIBSON,
Appellant,
vs.
CHARLOTTE BRUCE,
Appellee.

It is hereby stipulated between the undersigned counsel for both parties in the above entitled cause as follows:

First. The cause shall be advanced upon the docket of the Supreme Court, and an entry to that effect may be made upon the motion of either party without notice to the other.

Second. For present purposes the printing of the record is waived. It is agreed that the portions of the record necessary for the consideration of the Court upon hearing the present appeal, except as hereinafter stated, have been printed and may be found in the printed argument of counsel for Charlotte Bruce as follows:

Petition for removal on page 2; answer to said petition on page 3; affidavit of William E. Brooks on page 5; order of removal on page 5; motion to remand filed April 12th, 1881 on page 6; plea in abatement upon page 7; entry as to issue on plea and motion to remand, page 7; findings of the Court, page 8; entry remanding the case, page 9; entry allowing a supersedeas bond, page 9.

Third. It is agreed that this suit was commenced in the Superior Court of Cincinnati, on the 12th day of April, 1879. That a term of that Court for the trial of causes commences on the first Monday of each and every month, except the months of July, August and September during each year, (and in those months if the Court so order,) and ends with

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First. That fifteen terms of the Superior Court of Cincinnati intervened between the time when the case should have been at issue and might have been heard, and the filing of the petition for removal. Nothing that could have taken place in the case can excuse the delay and so prolong the time for removal.

Second. That the Circuit Court has specially found upon a trial of that question submitted to it, that at the time when the defendant in the Superior Court of Cincinnati, filed his petition for removal, he and the plaintiff were both citizens of Ohio and had been for more than seventeen months, and that the statement in the petition for removal upon which it was granted, that the plaintiff was then a citizen of New York, was not true.

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Second. For present purposes the printing of the record is waived. It is agreed that the portions of the record necessary for the consideration of the Court upon hearing the present appeal, except as hereinafter stated, have been printed and may be found in the printed argument of counsel for Charlotte Bruce as follows:

Petition for removal on page 2; answer to said petition on page 3; affidavit of William E. Brooks on page 5; order of removal on page 5; motion to remand filed April 12th, 1881 on page 6; plea in abatement upon page 7; entry as to issue on plea and motion to remand, page 7; findings of the Court, page 8; entry remanding the case, page 9; entry allowing a supersedeas bond, page 9.

Third. It is agreed that this suit was commenced in the Superior Court of Cincinnati, on the 12th day of April, 1879. That a term of that Court for the trial of causes commences on the first Monday of each and every month, except the months of July, August and September during each year, (and in those months if the Court so order,) and ends with

the commencement of the next term, except the June term, which ends on the Saturday preceding the first Monday of July. That the practice of said Court, as to the issue and trial or hearing of causes, is governed by the statutes of Ohio, relating to suits pending in the Court of Common Pleas of that State. That, on May 6th, 1879, the defendant moved to elect upon which cause of action the plaintiff would proceed, which motion was granted June 17th, 1879, and leave given to file an amended petition. That an amended petition was filed July 21st, 1879. On August 12th, 1879, the defendant made a motion to strike the petition from the files, which was overruled November 7th, 1879. That, on November 15th, the defendant moved to strike out portions of the petition, which was granted in part, and in part overruled December 6th. That, on the same day, the Court gave the defendant ten days leave to answer. That, on the 9th of December, the defendant demurred and moved to set aside the aforesaid entry of December 6th, which motion the Court, the same day, granted, but re-entered the same and overruled the defendant's demurrer, and granted the defendant sixty days leave to answer. That the defendant, January 30th, 1880, answered. That, on the 5th of February, 1880, the plaintiff moved to strike the answer from the files, which motion was granted February 25th, and leave was given the defendant to file another answer, or the same answer properly verified, within six weeks, which answer was filed April 7th, 1880. That, on April 23d, 1880, the plaintiff moved to strike out a large portion of said answer, which motion the Court, on May 28th, granted. That, on June 16th, the plaintiff demurred to the first and second defences, which demurrer was sustained July 6th, 1880, and on 7th of July, 1880, the defendant was granted sixty days wherein to file an amended

answer, which time upon motion of defendant was afterwards extended to September 18th. That, on September 18th, the defendant filed a further answer. That, on the 24th of September, 1880, the plaintiff moved to strike out portions of said answer, and on the 7th of October, further moved to strike out the fifth ground of defence. On the 27th of October, 1880, the Court granted the motion of September 24th, to strike out matter, but overruled the said motion of October 7th, namely to strike out the fifth defence. That, on March 4th, 1881, the plaintiff filed a supplemental petition, and on the 7th of March, a reply to the fifth defence. On the eighth of March, 1881, the petition for removal to the Circuit Court of the United States aforesaid was filed.

Fourth. The cause may be heard upon the merits under the rules relating thereto by submission, or if the Court permit, oral argument, upon March 19th, 1883, or upon any motion day of the Supreme Court thereafter, upon three weeks previous notice given by the counsel for Charlotte Bruce to the counsel for John B. Gibson, accompanying such notice with a copy of any further brief which may, hereafter, be printed in the above case by them.

Fifth. The foregoing matter enumerated in item third of this stipulation, is agreed to, without prejudice to appellant's right to claim that the same is irrelevant to this controversy, and that no question can be raised thereon in this Court by appellee.

LINCOLN, STEPHENS & SLATTERY,
O'CONNOR, GLIDDEN & BURGOYNE,
Attorneys for Mrs. Bruce.
HOADLY, JOHNSON & COLSTON,
THOMAS MCDOUGALL,
Attorneys for Gibson.

IN THE SUPREME COURT OF THE UNITED STATES.

No. 1081. JOHN B. GIBSON, *vs.* CHARLOTTE BRUCE. } Motion to advance.

Now, comes the appellee, Charlotte Bruce, by her counsel, and moves the Court to advance the above cause under the 32nd Rule, and under the stipulation filed herewith, and set the case for hearing on Monday, the 2nd day of April, 1883, as per notice filed herewith.

LINCOLN, STEPHENS & SLATTERY,
O'CONNOR, GLIDDEN & BURGOYNE,
Counsel for Attorneys in Error.

IN THE SUPREME COURT OF THE UNITED STATES.

No. 1081. JOHN B. GIBSON, *vs.* CHARLOTTE BRUCE. } *Notice.*

The counsel for appellant, John B. Gibson, will take notice that the counsel for appellee, Charlotte Bruce, will, on Monday, the 2nd day of April, 1883, submit this cause under the stipulation heretofore signed.

LINCOLN, STEPHENS & SLATTERY,
O'CONNOR, GLIDDEN & BURGOYNE,
Attorneys for Appellee.

CINCINNATI, *March* 10, 1883.

Received copy of above notice.

THOS. MCDOUGALL,
HOADLY, JOHNSON & COLSTON,
Attorneys for Appellant.

SUPREME COURT OF THE UNITED STATES.

No. 1081. JOHN B. GIBSON, *vs.* CHARLOTTE BRUCE.

It is hereby agreed that the three weeks notice, heretofore given for the hearing of this case on the merits under the rules relating thereto by submission or oral argument, if the Court permit, on the 2nd day of April, is by consent extended to Monday, the 16th day of April, 1883, at which time the case is to be heard as aforesaid instead of said 2nd day of April, the same being for the accommodation of counsel for appellant.

LINCOLN, STEPHENS & SLATTERY,
O'CONNOR, GLIDDEN & BURGOYNE,
Counsel for Mrs. Bruce.

HOADLY, JOHNSON & COLSTON,
THOMAS MCDOUGALL,
Attorneys for John B. Gibson.

CINCINNATI, *March* 30, 1883.

SUPREME COURT OF THE UNITED STATES.

No. 1081. JOHN B. GIBSON, *vs.* CHARLOTTE BRUCE,

It is further stipulated that said motion may, for like accommodation, go over to Monday, the 23rd of April, 1883, when the same shall be submitted to the Court.

LINCOLN, STEPHENS & SLATTERY,
O'CONNOR, GLIDDEN & BURGOYNE,
Counsel for Mr. Bruce.

HOADLY, JOHNSON & COLSTON,
THOS. MCDOUGALL,
Counsel for John. B. Gibson.

CINCINNATI, *April* 10, 1883.

THE AMENDED PETITION.

Charlotte Bruce, the plaintiff herein, states: That on the first day of October, in the year 1865, the plaintiff and defendant, they being unmarried, at the defendant's request entered into an agreement of marriage, by which each promised to marry the other; that said agreement was recognized by the parties and continually acted upon by them up to the first day of October, 1877; that afterward, to-wit: on or about the first of October, 1877, the defendant gave the plaintiff notice that his parents were anxious that he should marry another woman who was of large wealth, and that he could not reconcile his father to his marriage with the plaintiff, and that their contract must come to an end; that thereupon the plaintiff and defendant agreed that the defendant should pay the plaintiff for a breach of said agreement of marriage, and a release and discharge therefrom, the sum of fifty thousand dollars ($50,000), to be paid the plaintiff by the defendant in notes, as hereinafter stated; that the defendant thereupon, in fulfillment of the said agreement, gave the plaintiff, and she received therefor, his six promissory notes, amounting to fifty thousand dollars ($50,000), as follows, to-wit: Two notes for five thousand dollars ($5,000) each, payable o the order of the plaintiff in four and eight months after date respectively, and four other notes of ten thousand dollars ($10,000) each, payable to the order of the plaintiff in ten, twelve eighteen and twenty-four months respectively, all dated on the 15th day of October, 1877, and drawing six per cent, interest; that she can not give copies of the said notes, for reasons hereinafter stated; that afterwards, to-wit, on the 20th day of March, 1878, the defendant, fraudulently contriving to obtain the said notes of the plaintiff, came to New York, where she resided, and pretended *to her that he was anxious to marry her and to renew his engagement therefor*, and did then and there promise that if the plaintiff would give the said notes to him he would renew his engagement and marry her, and among other things he stated to the plaintiff that he knew that she had heard that he was engaged to another person, of large wealth, whose name is out of delicacy withheld, but which can be given if desired, and he thereupon made the most solemn asseverations that he was not engaged, that his affection for the plaintiff was so great that he had suffered the torments of the damned since he broke off their engagement, and that he knew she had suffered as much as he had; and after all that has passed between them he would

never have any peace on this earth or hereafter if he married any other woman than herself; that if the plaintiff would forgive him and take him back he would marry her as soon as he could go to Cincinnati and settle up his business, which would not take him a long time; that he would leave the notes with the plaintiff, but that if anything should happen to her before they were married, her heirs would collect them of him; that if the defendant died, the plaintiff would have that much or more, as, besides the twenty-five thousand dollars ($25,000) of her own property which she had, he would make provision that would give her, besides her own property, at least fifty thousand ($50,000) or more; that relying upon these statements, she gave him up the notes.

The plaintiff avers that the said statements were untrue, and were made with the intention of getting possession of the notes, and for no other purpose; that he was then engaged to said person and constantly visiting her; and that he had no intention of fulfilling the said promises, but resorted thereto for the fraudulent purpose of getting possession of the said notes, without any consideration therefor.

The plaintiff avers that from and after the time of the said agreement of marriage in 1865, she remained unmarried, relying upon his continued intentions and promises of marriage, except during the time of the receipt of said notes and the giving up of the same as aforesaid; and that she had ever been ready, willing, and offered to marry the defendant; yet the said defendant has wholly refused to marry her, to return to her or pay the said notes or any part thereof. The plaintiff alleges that she is entitled to the possession and use of said notes.

She therefore prays that the defendent may be decreed to deliver to her possession of the said notes; that she may have judgment upon the same so far as they are due for the full amount and interest, and for such further and other relief as she is entitled to.

3rd, 4th and 5th DEFENSE TO AMENDED ANSWER.

Your defendant for amended answer to plaintiff's amended petition, and for a third ground of defense, and in answer to all charges of misrepresentation, false statement and fraud contained in said petition, says: He denies that on the 26th day of March, 1878, or at any other time, he fraudulently contrived to get said note from plaintiff; he denies that, at said time, he pretended to plaintiff he was anxious and willing

to marry her, and to renew his engagement therefor; he denies he made any promise or agreement of marriage to or with plaintiff at any time after he executed and delivered said notes to her in October, 1877. He denies each and every allegation contained in said petition as to what induced plaintiff to surrender said notes to him as fully and specifically as the same are therein averred. He denies he was engaged to be married to any person at the time of the surrender to him of said notes. He denies that at that time or subsequently he made any representations or statements to plaintiff that he had any affection for plaintiff, or that he would marry her. He denies he ever made any false or fraudulent statement or promises for the purpose of obtaining said notes, or for any purpose whatever.

He admits he promised and agreed to marry plaintiff some time prior to October, 1877; he admits he executed and delivered to plaintiff the notes set forth in her petition; he admits he received said notes from plaintiff; he says said agreement of marriage was terminated; but he denies each and every allegation contained in said petition inconsistent herewith and not herein admitted to be true.

Defendant, by way of amended answer to plaintiff's amended petition, and for a fourth ground of defense, says he admits he promised to marry plaintiff some time prior to the time at which plaintiff avers in her said amended petition he gave her said notes. He says said agreement or promise of marriage was terminated and canceled, and he denies he ever made any other or subsequent promise or agreement of marriage. He admits he gave plaintiff the notes set forth in said petition. He says said notes were wholly without consideration, in that plaintiff never gave and defendant never received any value for the same. He avers that plaintiff, well knowing these facts, voluntarily, and of her own free will, and without any promise of marriage made to plaintiff by your defendant, and without any misrepresentation, fraudulent promise or statement of any kind made to plaintiff by your defendant for the purpose of obtaining said notes, or any other purpose whatever, she, the said plaintiff delivered said notes to your defendant, the defendant avers he is not now and never was liable thereon.

Defendant further says that if any consideration was given for said notes (which he denies), then said consideration wholly failed. Defendant denies each and every allegation contained in said petition, and not herein admitted to be true.

Defendant, by way of amended answer to plaintiff's amended petition, and for a fifth ground of defense, says: That at the time he executed and delivered the plaintiff said notes, and being the date set forth in said petition, plaintiff held in possession a large number of letters written by your defendant to plaintiff, which letters were wholly of a private and confidential character, and were intended to be read by plaintiff and no other person, and all of which plaintiff well knew; that plaintiff agreed to surrender and deliver up to your defendant all of the letters she held in her possession written by your defendant to her, so that the knowledge of their contents should not be communicated to any other person, and that the same should be wholly withheld from publicity and should become the sole property of your defendant, for the sum of fifty thousand ($50,000) dollars in the said notes of the same and dates as set forth in said amended petition. That said agreement was then made between your plaintiff and defendant in the city of Cincinnati; that plaintiff said all of said letters were in the city of New York, at her residence there, and that she had never read said letters or any part of them to any other person or persons, and never made the contents known to any other person or persons, and she then promised that if the said defendant would give her said notes, she would send him all of said letters on her return to New York; that with the belief that said letters were still private and confidential, and the contents thereof had never been made known to any other person or persons, and on the faith of said representations and agreement, and not otherwise, defendant executed and delivered said notes to plaintiff.

Defendant avers that said notes were given for the return of said letters, so as to preserve the same from publicity as aforesaid. Defendant further avers that plaintiff wholly failed and refused to perform her part of the said agreement, and has wholly failed and refused to surrender and deliver up said letters; that since the filing of the original answer in this cause plaintiff has caused a great many of said letters to be published in the newspapers of this city, and the same have been published therein, and she has given them to the public and made the contents thereof known in violation of said agreement, and has wholly violated said agreement, and said notes are without consideration and void.

Defendant further avers that since said notes were executed and delivered to plaintiff he has discovered that plaintiff has read a part of said letters to various persons, and made the contents thereof known prior to the time said notes were

given, and also since said notes were given; and also since said notes were given has caused said letters to be published as aforesaid, and all without the knowledge or consent of your defendant, and which, had defendant known, he never would have executed and delivered said notes or made said agreement as aforesaid.

The defendant further avers that plaintiff well knew at the time said agreement was made and said notes were executed and delivered as aforesaid, that the entire value of said letters to defendant was their contents being kept from the knowledge of any person or persons save plaintiff; and in the contents being preserved from publicity; and that they were wholly without any value to defendant after they had been given publicity in the newspapers as aforesaid; and at the time she caused them to be published, as aforesaid, she had agreed, as aforesaid, to return them to defendant so as to preserve them from publication, in pursuance of which said agreement, as aforesaid, and on the faith of which defendant executed and delivered to her the notes, as aforesaid, which notes plaintiff voluntarily returned to defendant without any promise of marriage being made by him to cause her to return them to him, and without any fraud on his part.

Defendant admits he did promise and agree to marry plaintiff some time prior to October, 1877, but said agreement of marriage was terminated before that date. He admits he executed and delivered to plaintiff the notes set forth in said amended petition; he denies each and every allegation contained in said amended petition and not herein admitted to be true.

Wherefore, having fully answered, he asks to be dismissed with his costs.

SUPPLEMENTAL PETITION.

"The plaintiff, Charlotte Bruce, by way of supplemental petition, says that since the filing of her original and amended petition herein, all of the promissory notes, mentioned in said original and amended petition have become due and payable.

She therefore prays for judgment and interest for the full amount of all of said notes and such other relief as in equity she may be entitled to, as in the original and amended petition."

Supreme Court of the United States,

OCTOBER TERM, 1882.

JOHN B. GIBSON,

No. 1081. vs.

CHARLOTTE BRUCE.

MOTION TO DISMISS. *or affirm*

This was a suit by Charlotte Bruce against John B. Gibson, in the Superior Court of Cincinnati, commenced on the 12th of April, 1879. It was brought to recover possession of, and judgment upon, six negotiable promissory notes, amounting in all to $50,000.00. The notes were dated October 15th, 1877, were made by the said Gibson payable to the order of the plaintiff, and delivered by him to her in settlement of a breach of promise of marriage. The notes all drew interest at the rate of six per cent. Two of the notes were for $5,000.00 each, payable in four and eight months after date, and four of them for $10,000.00 each, payable in ten, twelve, eighteen and twenty-four months after date.

At the time of filing the petition, so called, the notes payable in eighteen and twenty-four months, were not due. The petition alleges that, on the 20th

of March, 1878, without any consideration therefor, and upon false and fraudulent pretences, the said Gibson obtained possession of said notes and refused to return them or satisfy them in whole or in part.

Very many motions, demurrers and other proceedings were had in the case, which will be hereafter mentioned, when, on the 8th day of March, 1881, about two years after the bringing of the suit, and when, at least, fifteen terms of the said Superior Court had intervened, at either of which, except for the dilatory action of defendant, the same might have been heard, the said John B. Gibson, then defendant, filed the following petition for removal:

PETITION FOR REMOVAL.

"*To the Superior Court of Cincinnati:*

Your petitioner respectfully shows to this Honorable Court that the matter and amount in dispute in the above entitled suit, exceeds, exclusive of costs, the sum or value of five hundred ($500.00) dollars.

That the controversy in this suit is between citizens of different states, and is in the nature of a civil action at law or in equity.

That the plaintiff, Charlotte Bruce, was, at the time of the commencement of this suit, and since has been, and still is, a citizen of the state of New York; and that defendant, John B. Gibson, your petitioner, was, at the time of the bringing of this suit, ever since has been, and still is, a citizen of the state of Ohio.

Your petitioner further says: That this suit has not yet been tried, that the same is now pending in said Superior Court of Cincinnati, Ohio, and that this March term, 1881, of

said Court, is the first term at which said cause could be first tried, and that your petitioner desires to remove said cause, before the trial thereof, into the next Circuit Court of the United States, to be held in the Sixth Circuit, in the Southern District of Ohio, Western Division, in the city of Cincinnati, in pursuance of the Revised Statutes of the United States, in such case made and provided.

And your petitioner offers herewith a bond in the sum of one thousand ($1,000.00) dollars, with good and sufficient sureties, for his entering in said Circuit Court of the United States, on the first day of its next session, a copy of the record in this suit, and for paying all costs that may be awarded by said Circuit, if said Court shall hold that this suit was wrongfully or improperly removed thereto, and for doing all other acts required of him in the premises; and your petitioner offers such other bond and such other additional security as this Court may direct.

And your petitioner prays this Court to proceed no further herein, except to make the order of removal required by law, which your petitioner prays this Court to make, and to accept said surety and bond as sufficient, and to cause the said suit, and the record herein, to be removed into said Circuit Court of the United States, in the Sixth District, in and for the Southern Circuit, in and for the Southern District of Ohio, pursuant to the statute in such cases made and provided.

Cincinnati, March 8th, 1881.

THOMAS MCDOUGALL,
HOADLY, JOHNSON & COLSTON,
Attorneys for John B. Gibson, Petitioner."

ANSWER TO SAID PETITION TO REMOVE.

"Now comes the plaintiff, Charlotte Bruce, and by way of answer to the petition of the defendant to remove this case to the United States Court, upon the ground that said plaintiff is a resident of the state of New York, says:

That in May, 1878, she left the city of New York, in the state of New York, and came to Cincinnati temporarily, for the

purpose of arranging business between herself and the defendant; said business being the collection of notes for the amount of $50.000.00, given by said defendant to her in consideration that she released him from the marriage contract subsisting between them; and that, in August, 1879, she still regarded New York as her place of residence, as shown by an affidavit which she made at that time and presented to the auditor of Hamilton county, Ohio, for the purpose of showing that she was exempt from the payment of taxes on certain bonds during the time that she so considered herself a resident of the state of New York; that, notwithstanding said affidavit, which she made at that time, the auditor and treasurer of Hamilton County compelled this plaintiff to pay the sum of $600.00, as taxes upon said bonds during the time that she so declared that she was a resident of the state of New York. That thereafter she resolved to make Cincinnati her permanent home and place of business, as it had been for twenty-eight years preceding her removal to New York in the early part of 1877; and that in furtherance of her intention in October, 1879, she rented a house in said city of Cincinnati, and had the same completely furnished throughout with new furniture, which she then bought and paid for, and in which house she still resides; that still further carrying out her said intention to make the city of Cincinnati her future permanent residence, she took her two grand children, whose previous home had been in the state of Indiana, John Gibson Beall, aged about 15 years, and her grand daughter, Lottie Beall, then aged about 10 years, to make their permanent home with her at her said place of residence, where they now reside with her for the purpose of enabling them to attend and complete their education in the common schools of the city of Cincinnati, the said John Gibson Beall, being now in the High School, and the said Lottie now attending the district school in the city. That the said city of Cincinnati is now the permanent and only place of residence of this plaintiff where she intends for the future to make her home, and that, since October, 1879, she has been a citizen of the state of Ohio. That she has at present no intention of returning to the city of New York or elsewhere to make it

her future place of residence. The plaintiff further says that in the spring of 1880, she returned to the assessor at her said place of residence in Cincinnati for taxation her personal property, and in December, of 1880, she paid the first half of the year's taxes thereon for the year 1880.

O'CONNOR, GLIDDEN & BURGOYNE,
Filed March 14, 1881. *Attorneys for Plaintiff.*

MR. BROOKS' AFFIDAVIT FILED THEREIN.

STATE OF OHIO, }
HAMILTON COUNTY. } ss.

Wm. E. Brooks, being duly sworn says, that he is well acquainted with the plaintiff herein, and has known her for many years; that he knows of her looking for a house in September, 1879, for the purpose of making Cincinnati her future residence; that he knows she rented the house on Freeman street where she now lives, and furnished it and brought her grand-children here for that purpose; affiant also says, that he heard the plaintiff at that time say to him that she intended to become a citizen of this state and a resident of this city, and that she rented said house with that intention, and that he has frequently heard her say since then that she would never leave Cincinnati, but intended to live here during the balance of her life.

WM. E. BROOKS.

THE ORDER OF REMOVAL.

Now, this day this cause came on to be heard on the petition of the defendant, John B. Gibson, for the removal of this cause to the Circuit Court of the United States, in and for the Southern District of Ohio and Western Division thereof, Sixth Judicial Circuit, and upon motion of said defendant to approve said bond and accept said petition for removal, and was argued by counsel; and the court being fully advised in the premises, do find said bond and petition are sufficient, and do accept the same; and the court do further find, that the said petition for removal and said bond was filed at the term of this

court, at which this cause could be first tried and before the trial thereof.

It is further ordered, that said petition for removal of this cause be, and the same hereby is granted, and said bond for removal approved.

And the affidavit of Wm. E. Brooks, filed on the 14th day of March, A. D., 1881, with the answer of the plaintiff to the petition for removal, is made part of the record; and the court being of opinion that the law does not authorize it to inquire into the question of the residence and citizenship of the plaintiff as therein raised, declines, for that reason, to consider the said answer of plaintiff to said petition for removal, and the said affidavit of said Wm. E. Brooks on the question as to residence and citizenship of plaintiff therein raised.

On the 28th of April, 1881, Mrs. Bruce filed a motion to remand the case to the state court, which is in the words and figures following:

MOTION TO REMAND.

Now comes the plaintiff, Charlotte Bruce, and moves the Court that this cause which was removed upon the application of the defendant from the Superior Court of Cincinnati, Ohio, to this Court, be remanded to the said Superior Court of Cincinnati, for the reasons that this Court has no jurisdiction of said cause, because the said plaintiff and said defendant are now, and were at the time of the application for said removal, both citizens of the said state of Ohio.

O'Connor, Glidden, Burgoyne & T. D. Lincoln,
Attorneys for Plaintiff.

The facts as to the citizenship of the parties were also set up by way of plea with a prayer that the cause be remanded.

PLEA IN ABATEMENT.

Now comes the plaintiff, Charlotte Bruce, in her proper person, and says that this Court has not, and ought not to take, jurisdiction of this cause, which was brought into this Court from the Superior Court of Cincinnati, Ohio, because she says that at the time of the application in said Superior Court of Cincinnati for the removal of this cause into this Court, and for a long time before said application for said removal, she was and still is a citizen of the city of Cincinnati and state of Ohio, and that the defendant, John B. Gibson, who made said application, for said removal, was, at the time of said application, and before said time, and still is also a citizen of the state of Ohio and of said city of Cincinnati, and this she is ready to verify.

Wherefore, the said Charlotte Bruce asks that this cause be remanded to the said, the Superior Court of Cincinnati to be proceeded in according to law.

Filed May 5th, 1881. CHARLOTTE BRUCE.

To this plea, a demurrer was filed and subsequently by leave of Court was withdrawn, and the case heard upon testimony, upon the issue made in said plea, and upon the motion to remand, as appears by the following entry:

ENTRY AS TO ISSUE ON PLEA AND MOTION TO REMAND.

On motion to the Court by defendant, leave is hereby given defendant to withdraw his demurrer heretofore filed to the plea in abatement, and defendant is hereby given leave to introduce his testimony on the issue of fact joined, as to the jurisdiction of this Court made by said plea and abatement, and plaintiff's motion to remand. Filed November 7th, 1881.

The question as to the facts raised by the plea and by the motion to remand, came on for hearing,

when the parties filed in open Court a written stipulation, waiving any right they might have to a jury, and submitting the question to the Court, and the Court made a special finding, that at the time of filing the petition for removal, and for seventeen months prior thereto, and up to the time of the hearing, that Mrs. Bruce was a citizen of Ohio, all of which appears by the following entry:

FINDING OF THE COURT.

This cause, coming on to be heard upon the issue of fact of the citizenship of plaintiff, raised by the plea in abatement of plaintiff, heretofore filed herein, and by the motion of plaintiff to remand, on the ground of citizenship, as heretofore filed herein, and said parties hereto having, by stipulation in writing, filed herein, waived any rights they may have to a jury to try said issue of fact, and having submitted said issue of fact to the Court, and having introduced their evidence on said issue of fact, and the cause having been argued by counsel, on consideration whereof the Court does find that said plaintiff was a citizen of the state of Ohio from 1849 to 1877, and became, and was, a citizen of the state of New York from the spring of 1877 until the month of October, 1879; and that she became, and was, a citizen of the state of Ohio from the month of October, 1879, until the date of this entry, and is now a citizen of the state of Ohio; to all of which finding, as to the citizenship of plaintiff from the month of September, 1879, until the date of this entry, defendant excepted, and the questions of law on said motion to remand, are taken under advisement by the Court.

And at a subsequent day of the term, to-wit: November 25th, 1881, the Court made the following entry:

ENTRY REMANDING THE CASE.

"This cause, coming on to be heard upon the finding of facts in the plea in abatement, filed by plaintiff, and on the motion of plaintiff to remand said cause to the Superior Court of Cincinnati, Ohio, on the ground and for the reason that this Court has no jurisdiction of said cause, because said plaintiff and said defendant were, at the time of filing the said petition of defendant to remove said cause into this Court, citizens of the state of Ohio; and the Court being fully advised in the premises, on consideration whereof the Court grants said motion, and finds that this Court has no jurisdiction of this cause, because said plaintiff and defendant were, at the time said petition to remove said cause was filed, citizens of the state of Ohio; wherefore it is ordered and adjudged by the Court that said cause be, and is, hereby remanded to the said Superior Court of Cincinnati, Ohio, and that defendant pay the costs of the proceedings in this Court, to each and all of which defendant, John B. Gibson, excepts; and at the same time, said defendant, John B. Gibson, prayed an appeal from this order, judgment or decree, to the Supreme Court of the United States: which appeal, as prayed for, is allowed by the Court, and the Court fixes the amount of the bond, on appeal, in the sum of five hundred ($500.00) dollars."

The defendant having failed to file his bond within the time, and the entry not providing for a supersedeas, the defendant moved, before Mr. Justice Matthews, on the 27th of December, 1881, for leave to file a supersedeas bond, as appears by the following entry:

ENTRY ALLOWING A SUPERSEDEAS BOND.

"Now comes the defendant and the plaintiff, and the defendant offers and moves for leave to give a supersedeas bond according to law with sureties, which motion is granted, and

the penalty of the bond is fixed at the sum of ten thousand dollars, and Peter Gibson and Thomas Gibson are approved as sureties, to all which the plaintiff excepts."

In each of the above papers, the title of the case and the verification were regular, and they have not been printed, as no objection was made to either of them.

The above statement and papers present the questions raised by the motion to dismiss the appeal.

They are two. 1st. The petition for removal was too late. 2nd. The case was not one which entitled the said Gibson to a removal at the time he filed his petition.

I

The Petition to remove was filed at too late a time.

Upon this point, I will here succinctly repeat the various steps in the case. The petition in the suit was filed on the 12th of April, 1879. Gibson was then in this country as the records show, for he was served personally. Claiming that the petition presented a suit at law and that there were two inconsistent causes of action, the defendant moved, on May 6th, that the plaintiff be required to elect upon which cause she would proceed, which motion was granted June 17th, and leave given to file an amended petition making the case what we claimed it to be, a case in equity; and by changing a few words in the prayer of

the original petition, the amended petition was filed. This was July the 21st, 1879. On the 12th of August, motion was made by the defendant to strike the petition from the files, which was overruled after the summer vacation, on the 7th of November. On the 15th of November, the defendant moved to strike out the most of the facts showing Gibson's fraudulent statements to obtain the notes from Mrs. Bruce.

On the 6th of December, the Court determined this motion by striking out a small and somewhat immaterial part of that covered by the motion, and overruling the rest of it on the ground that the detailed statement of facts, found in the petition, was a necessary allegation in a petition setting up fraud and claiming the interposition of the Court thereon. On the same day, the defendant asked ten days for leave to demur or file a better answer, and the Court refused leave to demur, but gave defendant ten days to answer. On the 9th of December, the defendant demurred and moved to set aside the entry of the 6th of December, and on the same day the Court granted said motion and made a new entry like the one set aside and overruled the defendant's demurrer. Whereupon the defendant asked sixty days to file an answer, which was granted, upon the statement that it could not be sooner verified. The defendant, on the 30th of January, 1880, filed an answer. On the 5th of February, the plaintiff moved to strike the answer from the

files because not properly verified, which motion was granted on the 25th of February, and upon the application of the defendant, he obtained six weeks to file another answer or the same answer when properly verified, which answer was filed on the 7th of April. Thereupon, on the 23rd of April, the plaintiff moved to strike out a large portion of the answer as being impertinent. On the 28th of May, the Court granted said motion, and on the 16th of June, the plaintiff demurred to the first and second defenses, which demurrer was sustained on the 6th of July, 1880. The defendant thereupon, on the 7th of July, was granted sixty days to file an amended answer, which time, on motion of defendant, was, on the 24th of August, extended to September 18th. The defendant on the 18th of September, filed his answer containing much of the matter previously stricken out. On the 24th of September, the plaintiff moved to strike out the portion of said answer previously stricken out as irrelevant and scandalous, and on the 7th of October, the plaintiff moved to strike out the fifth ground of defense. On the 27th of October, 1880, the Court granted the motion of the 24th of September, to strike out the scandalous and impertinent matter and overruled that of the 7th of October, to strike out the fifth defense.

And thus the case stood, passing over the November December, January and February terms without

any action taken, at any one of which terms it might have been set down for hearing, and the plaintiff compelled to file any pleading that was necessary, or a decree could have been had by default, but no action was had. On the 4th day of March, 1881, the plaintiff filed what is called a supplemental petition. This petition simply set up the fact that all the notes had become due, and prayed judgment for the whole amount; and on the 7th a reply to the fifth defense was filed. On the 8th of the same month the petition for removal was filed.

The above is a complete but very succinct statement of the various steps taken in the case, and we claim that it clearly shows that the petition for the removal came too late.

The terms of the Court are monthly, and the Code of Practice of Ohio provides that:

"The answer or demurrer by the defendant shall be filed on or before the third Saturday, and the reply or demurrer by the plaintiff, on or before the fifth Saturday after the return day of the summons, or service by publication." *2 Rev. St. of O., p. 1244, Sec. 5097.*

Gibson was served personally, on the 12th of April, 1879, the day the suit was brought, and the writ was returnable the 21st of April; the answer or demurrer was due on the 10th of May, and the replication or demurrer to the answer was due on the 24th of May, 1879, and at any term after this, the case might have been heard or tried.

The statute of the 3rd of March, 1875, requires that the petition for removal shall be filed:

"Before or at the term at which the case could be first tried, and before the trial thereof."

It is evidently inconsistent with the statute that a party could take the course taken by the defendant here, and then have the right to remove. The abuses to which such a course would lead are quite evident. They are very well set out in the case of *Murray* v. *Holden*, 1 McCrary's Reports, 341.

That was a case brought to the September term, 1878, of the Circuit Court of Jackson County, Missouri, and it could have been tried at that term if the issue had been joined and the parties been ready. At that term the defendant interposed a demurrer to the petition, which the Court took under advisement, and held under consideration to the next term of the Court, when it was overruled. The defendant then filed a petition for removal, which was granted. The plaintiff moved, in the Circuit Court of the United States, to remand, which motion was granted.

In their opinion, the Court say:

"In all the states there is, by law or rule, a trial term, *i. e.*, a term at which a cause may, for the first time, be called for trial. In practice, but few contested cases are tried at the first trial term, and it often happens that controversies arise upon questions of pleading; so that, as in this case, no issues of fact are joined at that term. It is, nevertheless, the term at which, within the meaning of the law, such cases could first be

tried, and, therefore, is the term at or before which the petition for removal must be filed. The statute does not contemplate any delay for the purpose of settling the pleadings in the State Court. These can be settled in the Federal Court after removal, if necessary. If the local law makes the first term, after suit is brought, an appearance term merely, and declares that the second term is the one at which the case may be brought to trial, then the latter is the term at or before which the petition for removal must be filed. But where the first term after service of process, is the term at which, by law, a case is triable, then that is the term to which the act of Congress refers.

In other words, the term at which a case can "first be tried," is the first term at which it may, by law, be tried. The statute should be construed so as to require litigants who have a choice of forums, to make their election promptly. Besides, any other rule than the one above stated, would cause vexatious delays. If, for example, we should adopt the construction contended for by defendant's counsel, and say that the term referred to by the statute, is the term at which an issue of fact is joined, the result would be that litigants might, in many cases, postpone the joining of such an issue by raising and contesting questions of law in the State Court for the purpose of gaining time, as well as of ascertaining the views of the State Court before applying for a removal—thus continuing, under the act of 1875, the abuses which, under the previous acts, caused so much and such just complaint." *1 McCrary's Reports, 342.*

The case of *Cramer* v. *Mack* was one which originated in New York. In that case, after the defendant had noticed the case for trial, the defendant in accordance with the practice of New York, filed an amended answer. The effect of this was to prevent a trial at that term and to continue the case to the next term, at which the petition for removal was filed and

the cause removed. A motion was made before WALLACE, C. J. to remand, which was granted.

In their opinion the Court say:

"It was obviously the intention of the removal act to preclude a party from resorting to the expedient of a removal in order to deprive his adversary of the opportunity to try the cause, and the decisions in construction of the act are to the effect, that a party loses his right to remove if he permits the term to pass at which he could have placed the cause in a position to be tried upon the merits, if he had conformed to the rule of practice of the State Court." * * * * *

"In *Knowlton* v. *Congress & Empire Spring Co.*, 13 Blatchf., 170, it was held that where either party could notice the cause for trial at a term, that term must be considered the term at which the cause could be first tried; and in *Forrest* v. *Edwin Forrest Home*, 17 Blatchf., 522, Judge Blatchford held that the defendant lost his right to remove when, the cause being at issue and triable on the merits, he might have noticed it for trial. Other decisions intimate a severer rule, and hold that if the cause could have been triable, if the party seeking to remove had used due diligence in progressing the cause, the term at which it could have been ready for trial is the term intended by this act.

The present cause was triable at the January term of the State Court. The defendant had the power and the right to defeat the trial by serving an amended answer. The exercise of that right did not, however, enlarge his time for removal. There was an issue which it was competent for either party to bring to a hearing, and which the plaintiff sought to bring to a trial. The plaintiff was prevented from trying the cause by the act of the defendant. It does not avail the defendant that the practice of the Court gave him the right thus to defeat the plaintiff from trying the cause." *12 Fed. Rep. 804.*

Our case presents the features of the case of *Babbitt* v. *Clarke*, 103 U. S. R., 606. That was a case

commenced in Ohio, and the term at which it could be first tried under the Code of Practice, was the January term of the Court, which did not end until the 7th of April, though nothing was done but mere formal business after the 24th of March. The next term of the Court commenced on the 28th of April. On the 3d of April, during the former term, but after all but formal business was closed, the plaintiff filed a reply without leave, and at the next term, and on the 3d of May, the plaintiff filed an amended reply. On the 17th of May, during the term of the Court which commenced on the 28th of April, and before the cause had even been called for trial, the defendant, Babbitt, filed a petition for removal, and the cause was removed. The Circuit Court remanded the cause, whereupon the order remanding the cause was brought to this Court. The case presented the features of this cause, as they relate to the so-called supplemental petition, and to the filing the reply to the fifth defense. This Court say:

"The act of 1875 requires that the petition for removal shall be filed in the State Court at or before the term at which the suit could be first tried and before the trial. The answer of Babbitt, in this case, was filed in time, and the rule-day for a reply expired on the 18th of January. Had the case been called at any time after that date, and before April 3rd, neither party could have objected to a trial on the pleadings as they then stood. As no reply had been filed, the new facts set out in the answer would have been taken as true, and the rights of the parties determined accordingly. The case arising under

the Constitution and laws of the United States, was presented by the answer, and the right of Babbitt to his removal was as apparent then as now. It needed no reply to put his case in a condition for judicial examination. His answer required the Court to determine whether in law, with all the facts set out and uncontroverted, his composition in bankruptcy presented a valid defense to the judgment sued on. The pleadings presented, to say the least, an issue at law to be tried.

It is true that after the Court had substantially closed the business of the term, and had stopped the trial of causes, a reply was put on file without leave, which was supplemented the next term, also without leave, and that in this way the issues as they originally stood may have been to some extent changed; but that does not, in our opinion, relieve Babbitt from the consequences of his delay. The act of Congress does not provide for removal of a cause at the first term at which a trial can be had on the issues, as finally settled by leave of Court or otherwise, but at the first term at which the cause, as a cause, could be tried." *103 U. S. Rep., 611, 612.*

That case presented very few of the features of delay which are presented in this case, and we insist it is decisive of this case.

The Court is also referred to the following cases:

Fulton v. *Golden*, 9 Cent. L. J., 287.

Scott v. *Clin. & Spg. R. R. Co.*, 6 Biss., 536.

Ames v. *Col. Cen. R. R. Co.*, 4 Dill., 263.

Kerting v. *Am. Oleo. Co.*, 10 Fed. Rep., 19.

Hebert Adm. v. *Lefevre*, 31 La. An., 366.

The C. B. & Q. R. Co. v. *Welch*, 44 Io., 667.

Stough v. *Hatch*, 16 Blatchf., 451.

Miller v. *Kent*, 60 How. (N. Y.) Pr., 233.

Berrian v. *Chetwood*, 9 Fed. Rep., 678.

Traders Bank of Chicago v. *Tallmadge*, 9. Fed. Rep., 363.
Aldrich v. *Crouch*, 10 Fed. Rep., 306.

SECOND.

The issue must be made up with due diligence.

Some of the cases speak of the issue joined as being the first term, etc. But they evidently refer to the issue when made up with due diligence, and not to any issue joined after every sort of motions and dilatory proceedings have been had. The party need not wait in the State Court for the making up of the issue—that can be as well done in the Circuit Court of the United States as in the State Court. 1 *McCrary*, 342.

In the case of *Wanner* v. *Sisson*, the Court say:

"Applied to a cause in equity, the limitation is to be the first term at which the cause can be regularly set down, on due notice for hearing, and, before the hearing shall have taken place. The act, for obvious reasons, requires promptness in making the application, and if it is not made within the time specified, it is too late." *28 N. J. Eq., 118.*

This is undoubtedly the true rule, otherwise parties might be tempted to postpone the bringing the case to issue. The same rule is thus expressed in *Atlee* v. *Potter*.

"This cause could, under the local statutes above referred to, have been put at issue one or two terms before this was actually done, and it could have been tried, and under the Iowa

Statute it was triable, at the term at which the issues could have been made up. The provision of the Iowa Statute which has been referred to, definitely fixing the term 'at which the cause could be first tried,' limits the time at which the application for the removal can be made. The time for the removal cannot be extended under the specific provisions of the Code of Iowa, by the circumstance that, in point of fact, the issues are not made up at the first term." * * * * * *

"It was evidently the intention of Congress, by the language quoted, to require the party to apply for the removal at the trial term, even if the cause should not be in fact put at issue, or be actually reached for trial at that term." *4 Dill., 561.*

Mr. CH. JUSTICE WAITE, in the case of *Gurnee* v. *The County of Brunswick*, says:

"A cause cannot be tried until, in some form, an issue has been made up for trial. The pleadings or statements necessary to make the issue, are regulated by the practice in the Court where the trial is to be had. As soon as the issue is made up, the cause is ready for trial. The parties and the Court may not be ready, but the cause is. The first term, therefore, at which a case can be tried, is the first term at which there is an issue for trial. An application for removal, to be in time, must be made before or at this term."

I think the learned Judge does not mean to lay down this rule, except as to cases where the pleadings have been made up with all diligence. Further on the learned Judge (with whom Bond, Ct. J., concurred,) says:

"The itemized account, with the specific statement of the nature of each item, presented to the board and sent to the Court upon the appeal, constitute all the pleadings necessary to put the case in a condition for trial. The circumstances of a case may be such as to make it desirable that issues should be presented more specific than those which come up in this

form. If so, the Court may order accordingly, either upon its own motion or that of the parties. Such issues may simplify the trial when it is had, but there may be a trial without them For all the purposes of the present inquiry, such orders for specific issues may be likened to amendments to pleadings after issue has once been joined. They change, to some extent, the character of the trial to be had, but the Court could have proceeded without them." *1 Hughes, 277, 278.*

That case was remanded, though there was comparatively little delay.

In the case of *C. B. & Q. R. Co.* v. *Welch*, the Court say:

"The design of the statute evidently was to secure the speedy administration of justice. The removal of a cause may involve delay. If the applicant waits until the term at which it is ready for trial, the removal is certain to involve delay. We think, therefore, that the application for removal should be made before or at the term at which the cause is first triable under the law, whether the parties are ready to try it or not." *44 Iowa, 666.*

MR. JUSTICE GRAY, in the case of the *N. Y. Warehouse and Security Company* v. *Loomis*, uses this language:

"The main fact, purpose and effect of this enactment are, that a party, who intends to remove a case from a State Court into a Federal Court for trial, shall do so, not only before trial in the State Court, but at the first term at which a case is at issue for trial, and might be ordered to be tried there." *122 Mass., 432.*

The removal was refused. The learned Judge refers to cases before Judges Davis, Drummond and Dillon, where the issues are spoken of as fixing the first

term, but in each case referred to, the removal was refused though the delay was short. We are a long way within all these cases.

In the case now being presented there was "an issue which could have been tried even before the 27th of October, and at least four terms after that the case was at issue, at any one of which it could have been heard; or if not then at issue, at which the defendant could have taken a decree by default or forced the plaintiff to a trial.

See *Berrian* v. *Chetwood,* 9 Fed. Rep., 678.

There were issues upon which a trial could have been had.

But the issue spoken of here does not necessarily mean an issue of fact, it may be an issue of law as well.

Babbitt v. *Clarke,* 103 U. S. R., 612.

And in the case before the Court there were issues of law and fact which might have settled this case.

First. On the 9th day of Dec., 1879, the defendant filed a general demurrer to the amended petition. If that had been sustained it would have ended our case. That was an issue of law that might have ended the case. None of the authorities hold that all the issues upon every point in the case shall be settled, but only those issues filed in due time, upon which the case may have been fully disposed of under the rules of law.

Second. On the 30th of January, 1880, the defendants filed an answer containing four grounds of defense, the first two were full of scandalous and impertinent matter which was subsequently stricken out, but the third and fourth defenses were a direct denial of all the facts of the petition. Here were issues of facts upon which the case might have been tried. This answer, however, was stricken from the files because not properly verified. Whose fault was it that it was not properly verified? Sixty days had been given him to file his answer, covering two whole distinct terms of the Court. Thereupon, six weeks was given the defendant to file another answer properly verified, or to refile this same answer properly verified.

The answer but slightly modified was refiled on the 7th of April, 1880. None of the scandalous and impertinent matter had been stricken out, though clearly improper in such a pleading. And this matter was stricken out by order of Court on the 28th of May, 1880.

On the 16th of June, the plaintiff demurred to the first and second defenses, which demurrer was sustained on the 6th of July. This left the third and fourth defenses standing, which were a direct denial of all the facts found in the petition.

Here again were issues joined upon which a hearing could have been had and the case disposed of.

Third. But the defendant was not yet satisfied, and on the 7th he obtained sixty days to file an amended answer.

On the 24th of August, he obtained an extension to file his amended answer, to the 18th of September, on which day he filed an answer containing five defenses, the two first of which did not differ very much from those found in his former answers, which two defenses had been overruled. The third and fourth were the same, or substantially the same, as those of the former answer and were a direct denial. The fifth was the setting up of a different contract from that set up in the petition, and was therefore, as the Supreme Court of Ohio has decided, a denial.

It was a departure and should have been stricken from the files upon the plaintiff's motion, and would have been, except that it was treated by the Court as a denial under said decision.

Here, then, were three defenses putting the petition and all its material averments in issue at the September term of the Court, and the case, as one at issue, might have been tried at that term, and at any of the five subsequent terms that intervened between the issue and the petition for removal. On the 24th of September, the plaintiff moved to strike out the very large amount of scandalous and impertinent matter in the amended answer, it being, as the pro-

ceedings will show, substantially the same as had been by another judge of that Court stricken out. At that time the judges of the Court rotated, from room to room, so that by this course taken in filing and re-filing the same answer, the defendant had learned the views of all the judges of the Court upon very much that he put in issue in this case.

On the 27th of October, the Court ordered the very large amount of scandalous and impertinent matter to be stricken from the answer; and so the case remained at issue upon the third and fourth defenses, and as we claim on the fifth, over the November, December, January and February terms of the Court, at either of which it could have been heard and disposed of, until the March term, when the petition for removal was made.

Surely here were issues both of law and of fact under any of the decisions upon which the case might have been heard.

THIRD.

The filing the supplemental petition on the 3rd of March, and the reply to the fifth defense on the 7th of March, did not prolong the time of removal.

First. The supplemental petition did not present any new feature of the case, or authorize any action of the Court that it might not have taken without it. The amended petition set out the date of the

notes, the time they had to run, and, of course, the time they became due, and if at any time after they all became due, the Court had decreed that the defendant deliver them to the plaintiff, it would, to avoid another action, render its decree for the whole of the notes. If the specific prayer was not definite enough, the general prayer, "for such further and other relief," would have authorized a decree for the amount due upon all the notes.

"Where the facts appear in the complaint, the Court is to give such relief as the parties are entitled to, whether asked for or not in the prayer of the complaint."

Jones v. *Butler*, 20 How. Pr. R., 191.

Emery v. *Pease*, 20 N. Y., 64.

The Court, as a Court of Equity, having obtained jurisdiction of the cause, would proceed to render a decree for any relief the plaintiff was entitled to, even though the relief would not, standing alone, have authorized the bringing of the suit in equity.

Pool et. al. v. *Docker et. al.*, 92 Ill., 509.

Brewster v. *Colegrove*, 46 Conn., 105, 106.

This rule, to render judgment for what is due up to the time of the decree, is repeatedly acted upon by Courts of Equity in foreclosure suits.

Adams v. *Essex*, 1 Bibb., 150, 151

Manning v. *McClurg et. al.*, 14 Wis., 355.

King v. *Longworth*, 7 Ohio, 586.

The same rule is enforced in insurance and other

mercantile cases, where a party goes into a Court of Equity to reform a policy or other contract, or to require the delivery of a contract agreed upon before loss, and in the same bill asks an enforcement of it, or asks for such other relief as he may be entitled to, the Court, when it decrees reformation or delivery of the contract, will, at the same time, enforce it to avoid another action.

The Globe Ins. Co. v. *Boyle*, 21 Ohio St. R., 130.

Kibby v. *Kibby*, Wrights Rep., 608, 609.

The same rule was acted upon in Ohio in the case of *Mitchell* v. *Longworth*. Longworth had given Mitchell a lease with privilege of purchase.

Mitchell elected to purchase and demanded a deed. Longworth, claiming that Mitchell had agreed for a sufficient consideration to give up his right of purchase, sold the property for an increased consideration to a railroad company. Mitchell brought suit for a specific performance against Longworth and the railroad company. Longworth set up by way of answer that he never owned but an undivided half of the property, the fee of the other undivided half being in his wife, which the executors had conveyed to the railroad company. Mitchell's lease was not recorded, but he had such possession of the ground as brought home notice to the railroad company, and the Court decreed specific performance of the half which Longworth owned and conveyed to the railroad company,

and in the same suit decreed to Mitchell compensation for the other undivided half which he never owned. This was the difference between the value of the land Mitchell demanded title of, and the sum he was to pay for it, by the terms of his lease. He obtained a decree for a very large amount.

Longworth v. *Mitchell*, 26 Ohio St. R., 344.

Rowland v. *Entrekin*, 27 Ohio St. R., 49.

The same rule is applicable to a case like this, where a party, by fraud, obtained from another negotiable promissory notes, given for valuable consideration by the former to the latter, a part of which are not due and which he refuses to return. In such a case, a suit in equity requiring the party to return the notes and for judgment upon them, will lie. In that case the Court might enjoin their transfer, order them given up, and at the same time render judgment upon them, if due.

Kibby v. *Kibby*, Wrights Rep., 608, 609.

Richards v. *Fridley*, Wrights Rep., 167.

The same decree could, therefore, have been rendered upon the amended petition, as upon that and the supplemental petition together.

Second. Nor was the time for removal postponed by the filing the replication to the fifth defense on the 7th of March, for the reason that no replication was necessary. The case was at issue without it, and

had been for several terms of the Court, and from the 27th of October, 1880.

The plaintiff alleges in her amended petition, that the notes were given in settlement of a breach of promise of marriage. The fifth defense sets up that the notes were given in consideration of the plaintiff's promise to deliver to him his letters written to the plaintiff, which she had neglected to do. This was a very different contract from that upon which the plaintiff sought to recover. If the defendant could prove it, it would defeat the plaintiff's right to recover. It was therefore, an immaterial averment and required no reply. It should have been stricken out upon the plaintiff's motion made on the 7th of October, 1880.

The reply was filed to avoid a conclusion which it was supposed might be drawn by the jury, should it come to them, from the want of the denial of the facts alleged in this defense. It was in fact a denial of the right of action set up in the petition and required no reply.

This has been determined by the Supreme Court of Ohio in a very similar case.

Simmons v. *Green*, 35 Ohio St. R., 104, 107.

The case was therefore at issue on the 17th of October, 1880, and might have been heard at either the November, the December, the January, or the February terms of the Court, which is sufficient to defeat the right of removal in itself.

But we insist that the previous delay of the defendant had the same effect, and that it would be a gross abuse of the act of March 3rd, 1875 to permit a removal after such delay, and as will more fully appear under the next head.

Third. But, if the case was not at issue until the replication was filed, there is still no cause for removal; the statute requires at least some sort of diligence in preparing the case for trial or hearing. The party after being served cannot quit the country, leave his case to his lawyer to battle for delay as well they may, and after they are driven from every corner and hiding place, and brought face to face, remove the case, under the act in question, to the Circuit Court of the United States. By the removal on the 8th of March, the case would not come into the Circuit Court until the April term. If retained there, the petition must be reformed into a bill in chancery, and there could be no hope of hearing it before the October term of the Court. For the last two or more years, the District Judge of the Southern District of Ohio has been over-worked, and the equity docket has been reserved for the Circuit Judge, who has also had a very extended field of labor in the eight districts under him. In the Kentucky District there are four subdivisions, and the Circuit Judge regularly attends at least two of them. In Ohio there are four places of holding

Court in the two districts, at three of which I know the Circuit Judge attends, and I think he goes to all four. And the terms of the Circuit Court, held at Cleveland in the Northern District, for April and October terms, commence the same day as the same terms in Cincinnati in the Southern District.

It was quite evident at the time the petition for removal was filed, that there would be a motion to remand, which, if granted, would open a long vista of delay quite interesting to the defendant, unless indeed the Court shall act upon the case upon this motion.

Other facts making against removal.

The papers sent to the Circuit Court show, that on the 23rd and 24th of September, 1879, the plaintiff took testimony in Syracuse, New York; that on the 3rd and 4th day of June, 1880, the defendant took testimony in Cincinnati; that on the 16th of June, 1880, the defendant served a notice upon the plaintiff, to take testimony in Philadelphia, Penn., where she appeared with her counsel, but no testimony was there taken; that on the 14th of September the defendant took testimony at Titusville, Penn., and on the 28th and 29th of the same month, he took evidence under another notice at Titusville; that on the 6th of November, defendant took depositions at Pittsburg, Penn.; that on the 16th of December, 1880, the defendant took depositions in Barron, Wisconsin;

that on the 3rd of March, 1881, the plaintiff took rebutting evidence in Cincinnati, Ohio; that on the 8th of March, 1881, the defendant, under a notice to take testimony, summoned Mrs. Bruce before a notary at their office to give evidence, and there, on that day before the filing of the petition for removal, she testified that she was and had been a citizen of Ohio, though when she first came to Cincinnati, she came to obtain a settlement of these matters. This deposition was continued for several days, and was not filed at the time of the removal, and has not been filed since.

It is said that the plaintiff caused some of this delay, but this charge is groundless. She was compelled to state the facts in her petition which charged a tricky and fraudulent possession of the notes he obtained from her, and that was no reason for a motion to strike out, which was denied. The plaintiff's motion to strike from the several answers of the defendant, a large amount of irrelevant and scandalous matter was granted. And should the Court read it, they would see that no person was bound to answer it, or permit it to remain a part of the pleading, whether true or false. It is enough to meet the charge of delay on the plaintiff's part, that the Court granted the motion. Some delay was caused in the demurrer and the motions to strike out, from the fact that the terms of the Court were monthly and the judges rotated, from room to room. All three of them, at different

times, had the case before them, and two of them heard demurrers and motions to eliminate from the answer a large amount of impertinent matter, so that this motion and the demurrer came before the three judges of the Court, and defendant had an opportunity of learning their views upon the questions involved.

The rulings were generally against the defendant upon any material matter, and it is evident from the record that notwithstanding the great learning of the counsel and their skill in legal tactics, that they had exhausted themselves in that line before the Superior Court of Cincinnati, and were at or very near the end of these efforts at delay, and that a trial would be insisted upon, when the petition to remove was made.

The ground, upon which the State Court found the term to be the first at which the case could have been tried, was the filing of the supplemental petition and the reply to the fifth defense. We have shown that the supplemental petition added no fact that was not in the amended petition and made no new prayer, and did not change the nature of the case. We have also shown that the fifth defense was but a denial of the plaintiff's cause of action, and required no reply. So that that reply did not change the nature of the proceeding. The judge, at special term in the Superior Court, erred in so far as he prolonged the time of removal by the filing of these papers. Even if it had

somewhat changed the nature or character of the suit, it could not have had that effect, as the above cases fully show.

II

Both parties, at the time of filing the petition for removal and for seventeen months before, were citizens of Ohio.

The next question presented upon the motion is this. At the time of bringing the suit, Mrs. Bruce was a citizen of New York, and John B. Gibson, a citizen of Ohio; but for more than seventeen months before the filing the petition for removal, she had been a citizen of Ohio, of which state Gibson was also a citizen. In his petition for removal, Gibson presented a case entitling him to such removal, for he alleged that Mrs. Bruce was, at the time of bringing the suit and at the time of filing the petition for removal, a citizen of New York. Mrs. Bruce, however, immediately filed an answer setting up her citizenship in Ohio, at that time and for months prior thereto, and denying the right of removal on that account, (see pp. 3 & 4), and she offered proof of the fact.

The Superior Court decided that they could not go into the question of citizenship, but must act upon the petition for removal, and leave that enquiry to the Circuit Court. (See, pp. 5 and 6.)

This precise question, so far as we can find, has

never been determined by any Court, except by Judge Baxter. (9 Fed. Rep. 540.)

Though quite a number of cases have been determined bearing upon this point that would seem to affect it, I do not find that the very question, here now presented, has ever been before this Court, though Judge Baxter, in his opinion, says that it has been twice presented *in argument*, once in *Insurance Company* v. *Pechner*, 95 U. S. R., 185, and again in *Bondurant* v. *Watson*, 103 U. S. R, 285.

I do not think that the question here now presented, was in any way before this Court in either of the above cases, except perhaps in the argument of counsel. The case of *Insurance Company* v. *Pechner*, arose under the 12th section of the act of 1789, which clearly required the party when bringing the suit to be a citizen of another state, to ask for a removal at the time of making his appearance. Under that act only the defendant could remove, and then only when the plaintiff was a citizen of the state in which the suit was brought.

West v. *Aurora City*, 6 Wall., 141, 142.

The question, in the first named case, was whether under that act the allegation of citizenship, at the time of filing the petition for removal, was sufficient, there being no allegation of citizenship at the commencement of the suit.

The Court, after pointing out the difference in the

language of the act of 1789 upon this point, and the acts of 1866, 1867 and of 1875, holds that under the former act the allegation of citizenship at the commencement of the suit was necessary. The case did not touch this question.

In the case of *Bondurant* v. *Watson*, 103 U. S. R., 287, the petition for removal, though it set out the citizenship at the time of filing the petition for removal, did not allege the citizenship at the commencement of the suit.

The Court decided, that inasmuch as the record in the case showed such citizenship at the commencement of the suit, the record supplied the defect in the petition if such allegation was necessary so that in that case, it was not necessary to determine whether there should be such citizenship at the commencement of the suit. Much less did it present the question now before the Court, to-wit: the want of such citizenship at the time of filing the petition for removal.

Now, we claim that the constitution does not give the United States Courts any jurisdiction, (upon the question of parties,) unless, at the time the suit is brought in those Courts, or is brought into them, the same is then a suit between citizens of different states. *See Judge Baxter's opinion at the end of this brief.* And, so far as those Courts are concerned, the suit is commenced therein when the motion is made for a removal, and not before.

The right of removal is statutory, and the language of the act of March 3rd, 1875, under which the removal was had, requires that there *should be, not should have been,* a controversy between citizens of different states to authorize a removal. It does not refer to any past time, but is in the present tense.

At the time this case was brought into the Circuit Court of the United States, there was no controversy between a citizen of Ohio and a citizen of any other state, but if there had been one at the commencement of the suit, would it be a case for removal? In this case both the parties had been citizens of Ohio for at least seventeen months, when the petition for removal was filed, and the first effort to bring the suit into the Circuit Court was begun, and the controversy then was between citizens of Ohio. Suppose Mrs. Bruce had become nonsuited, could she have commenced her suit in the Circuit Court of the United States, at the time of the filing the petition for removal? If not, how could John B. Gibson commence his suit or bring the suit into that Court?

Suppose at the time the suit is brought no cause of action is stated, so that on general demurrer judgment must go for the defendant, and that an amended petition is subsequently filed, setting forth a cause of action, but in the meantime the parties had become citizens of the same state. Could they then remove the case to the Circuit Court of the United

States, simply because, when the suit was commenced, they were citizens of different states? *See Gurnee* v. *County of Brunswick*, 1 Hughes, 277, 278.

Or suppose at the time the suit is commenced it is between citizens of the same state, and that subsequently other persons come in, or are brought in, who are citizens of different states, would the latter be deprived of the right of removal, because at the commencement of the suit the controversy was wholly between citizens of the same state; *the Removal Cases, so called*, presented facts of that character, and yet the right for removal was sustained, as between the subsequent parties. 100 *U. S. R.*, pp. 470, 471.

It seems to me, the fact that the act applies to all cases pending in the State Courts, throws some light upon this question. Many cases at that time had been pending in the State Courts for years. The citizenship may have been and was likely to have changed in the meantime, and there is no doubt that at the time when the act took effect, in many of the pending cases the citizenship had changed, and there was then no controversy between citizens of different states. Is it to be supposed that Congress intended to grant the right of removal in such cases?

Many cases had been tried in the State Courts, gone to judgment, been reversed in the Court of last resort of the state, and sent back for error, and other proceedings had in the State Court prior to the passage

of the act, and yet the right of removal was secured in cases of that character, provided there was *then* a controversy between citizens of different states. Such was the case of *King* v. *Worthington*, 104 U. S. R., 48.

Now, could that case have been removed after the bringing the suit in the lower Courts, and within the two years allowed by the laws of Illinois to file the transcript in the Superior Court, if the parties had been citizens of Illinois and were such when the petition for removal was filed? That is illustrative of the question now under consideration. The parties were under no obligation to file the transcript, from the Supreme Court of Illinois to the Superior Court, and if they had not done so the controversy would have been at an end. They had two years to file it, and if when they did it they had become citizens of Illinois, would there then have been any controversy between citizens of different states?

A case with which I was connected, *King* v. *The Enterprise Ins. Co.*, pending in New Albany, Indiana, April, 1880, had gone to judgment in the lower Court. That judgment was reversed by the Supreme Court of Indiana. (45 *Ind.*, 63.) The case went back to the lower Court and remained there until after the passage of the act of 1875, when it was removed to the Circuit Court of the United States. Now, suppose the citizenship of the parties had in the meantime

changed, as it was so likely to do in this country, would the removal have been permissible? The case was soon after settled and is not reported, no action being taken upon it in the Circuit Court.

And *King* v. *Worthington* was commenced in 1870, (104 *U. S. R.*, 44.) and was pending over five years before it was removed. Many cases had been much longer pending in the State Courts, when the act of 1875 was passed, and had undergone very many rulings and changes, as to the nature of the controversy, citizenship, etc. Now, is it to be supposed that where the citizenship is so changeable as in those cases, that the right of removal will depend upon the state of the case, and the parties at the time when the suit was commenced in the State Court, when no action in the United States Courts was had or contemplated, and when for years there had been no controversy between citizens of different states, for the reason that at the commencement of the suit they may have been such?

The decisions heretofore made are against the removal.

Though the precise question now here has not been decided, I find that many of the cases throw much light upon it; for the reason that it has no where, that I can find, been contended except perhaps in one or two cases, that the proper citizenship must not exist at the time the case is brought into the Circuit

Court, or at the time of filing the petition for removal. There has been much difference of opinion, or apparent difference of opinion, whether it must not appear in the case, either in the petition for removal or in the record of the case brought to the Circuit Court, that at the time of the commencement of the suit the citizenship in different states has been alleged.

In the following cases it has been decided that the citizenship in different states, must be shown at the time the suit was commenced, but in no one of them was there any intimation that such citizenship must not continue up to the time of the filing of the petition for removal. In the case before the Court, such continued citizenship was averred, or no removal would have taken place.

Beede v. *Cheeney*, 5 Fed. Rep., 389.

Kaeiser v. *Ill. Cen. R. R. Co.*, 6 Fed. Rep., 5.

Holden v. *The Putnam Fire Ins. Co.*, 46 N.Y. R. 6.

Tapley v. *Martin*, 116 Mass., 275.

The Ind. R. W. Co. v. *Risley*, 50 Ind., 64.

In each one of these cases, the citizenship, in different states at the time of filing the petition, was alleged.

But, in the following cases, it has been directly held that the citizenship, in different states, must be at the time of filing the petition for removal, and that it need not be alleged as of the commencement of the suit.

Wehl v. *Wald*, 17 Blatch, 346.

McLean v. *The St. Paul & Chi. R. W. Co.*, 16 Blatch, 317.

Chi., St. Louis & N. O. R. R. Co. v. *McComb*, 9 Reporter, 569, 570.

Jackson v. *Mu. Ins. Co.*, 3 Woods, 417.

Johnson v. *Monell*, 1 Woolw. 397.

Curtin v. *Decker*, 5 Fed. Rep., 386.

Insurance Company v. *Saettel*, 33 Ohio St., 280, 281.

Jackson v. *The M. L. Ins. Co. of N. Y.*, 60 Geo., 427.

Nye v. *Northern Cen. R. W. Co.*, 24 Hun., (N. Y.,) 557.

Dillon on Removal of Causes, Sec. 72, p. 88.

McGinnity v. *White*, 3 Dill., 354.

While the *very point* before the Court upon this motion has not been decided, except by Judge Baxter in this case as has been stated, or been necessary for determination in any case, the decisions which have been made, strongly favor the motion now before the Court.

Thus, in *Johnson* v. *Monell*, MR. JUSTICE MILLER, in giving the opinion of the Court, says:

"The act does not in terms prescribe the time at which the citizenship of the moving party must be acquired. Nor is there anything from which to imply that a time was intended to be limited in that regard. Had Congress intended to confine the privileges of the act to parties who were citizens of

different states at the commencement of the suit, it would have been very easy so to have provided. It did not see fit so to do. On the other hand, in express terms, or at least by the strongest implication, it provided otherwise. The language is: 'Where a suit is now pending, or may hereafter be brought, in any such Court in which there is a controversy between a citizen, etc.,' which is as much as to say, whenever a controversy shall arise in a suit pending in a State Court, the parties to which shall at any time be citizens of different states, the cause may be removed. No time at which the citizenship shall be acquired is limited. So the inference is that it may be acquired at any time."

Johnson v. *Monell*, Woolw. Rep., 397.

This decision was under the act, the language of which is identical with that of the act of 1875.

In the case of *Jackson* v. *The Mutual Insurance Company*, 3 Woods, 417, the Court, MR. JUSTICE WOODS, giving the opinion, says:

"Under the act of 1875, wherever there is a controversy between citizens of different states, in any suit pending in a United States Court, the cause may be removed. Under the act of 1789, the cause could not be removed unless the suit was *commenced* by a citizen of the state in which the suit was brought against a citizen of another state. The distinction, in the language and meaning of the two acts, is clear and palpable.

The view, above expressed of this act of 1875, has been taken by the Supreme Court of Georgia in the case now under consideration: *Jackson* v. *The Mutual Insurance Company*, 60 Ga., 423.

The authorities cited, and a comparison of the acts of 1789 and 1875, show that it is immaterial, under the latter act, whether or not the parties were citizens of different states at the time the suit was commenced, provided they are citizens of different states at the time of filing the petition for removal.

I am of opinion, therefore, that the second ground for remanding the cause is not well taken." *3 Woods, 417.*

In *McLean* v. *The St. Paul & Chi. R. W. Co.*, the petition for removal set out that the parties were, at the time of the filing thereof, citizens of different states without making any allegation as to the citizenship at the commencement of the suit. MR. JUSTICE BLATCHFORD, in delivering the opinion of the Court, says:

"The expression in the act of 1875, 'any suit now pending or hereafter brought, in which there shall be a controversy between citizens, either party may remove it,' is in the same form, and must have the same meaning, in respect to the point now under consideration, as the expression in the act of 1867, 'where a suit is now pending, or may hereafter be brought, in which there is a controversy between a citizen and a citizen, the latter citizen, whether plaintiff or defendant, may file a petition for the removal of the suit.' The observations of Mr. Justice Miller in regard to the act of 1867, apply fully to the act of 1875." * * * * * * "On the facts set forth in the petition in this case, this suit was and is one properly removable into this Court, under the act of 1875." *16 Blatchford C.C. Rep., pp. 316–7.*

In *Wehl* v. *Wald*, the same learned judge says:

"I had occasion to consider sections 2 and 3 of that act, in deciding a motion to remand in the case of *McLean* v. *The St. Paul and Chicago Railway Co.*, in this Court, (*16 Blatchford C.C. R., 309.*) and held, that, under those sections, it was not necessary, in order to a removal, that it should appear that the parties were citizens of different states when the suit was commenced." *17 Blach., 346.*

And again this same Judge, in *Chi., St. Louis & N. O. R. R. Co.* v. *McComb*, says:

"As to the second ground, the petition for removal states that McComb is a citizen of the State of Delaware, but does not state that he was such citizen when the suit was commenced. This question has been decided by this Court in *McLean* v. *St. Paul and Chicago Railway Co.*, (*16 Blatchford C.C. R., 309.*) in which the same point was taken as to a petition for removal under the act of 1875, and was overruled." *17 Blatchford C.C. R., 377.*

In the case of *Curtin* v. *Decker*, the Court (DYER, C. J.) says:

"It must be admitted that the question is not free from difficulty, but I am unable to avoid the conclusion, that by the language used in sections 2, 3, and 5 of the act of 1875, it was intended to give the parties the right of removal, in case the requisite citizenship existed at the time of the application for removal. This seems to me to be the most reasonable construction of the statute, and the weight of authority appears to sustain that view. * * * * * And it is not to be overlooked that the whole language of the act of 1875, in this respect, is very different from that of the act of 1789." *5 Fed. Rep., 386.*

In the case of *Insurance Company* v. *Saettel*, the Court say:

"It is claimed that the application is defective in not stating the citizenship of the parties *at the time of the commencement of the action.* But this application was made in May, 1875, when the statute governing the subject, was the act of Congress of March 3rd, 1875. (*18 U. S. Stat. at Large, 470.*) So far as citizenship is concerned, that act makes the right of removal depend wholly upon the status of the parties at the time of the application. The language or so much of it as bears upon the present case is as follows:" *33 Ohio, 381.*

After quoting the language of the section, the Court proceeds:

"So far as relates to the status of the parties, this section only requires that a suit *be pending* in a state court, in which there *shall be a controversy between citizens of different states;* and the right of the removal is not made to depend on their citizenship at the commencement of the action." *33 Ohio, 381.*

I find but two cases that would seem to contain anything in opposition to the view above set out; one is a case before JUDGE BROWN of the Michigan District, and the other before MR. JUSTICE BRADLEY in the Eastern District of Texas.

The case before Judge Brown was in June, 1879. And though there was not much delay, the Court remanded the case. It was a case brought in the State Court when both parties were citizens of Michigan; the suit was commenced on the 8th of November, 1878, and the petition for removal was on the 11th of February, 1879. Between these dates the defendant had moved to Wisconsin, and was a citizen of that state when he filed his petition for removal. It may be in that case that the party removed from the state for the simple purpose of depriving the State Court of its rightful jurisdiction. It would seem so from the language of the learned judge. But that is not the case before the Court.

The removal of Mrs. Bruce to Ohio did not deprive the state of its jurisdiction, and it was not, and could not have been, for any such purpose. The learned District Judge in the Michigan District seems

to differ from MR. JUSTICE MILLER in the case *Johnson* v. *Monell*, Woolw., 397, and MR. JUSTICE DILLON and DUNDRY in *McGinnity* v. *White*, 3 Dillon, 354.

In the case of *Houser* v. *Clayton*, the party seeking to remove the suit was a citizen of Texas, and at the time of the commencement of the suit the plaintiff, Houser was an alien and a citizen of Austria. The petition for removal was amended, and between the time of the filing of that petition and the commencement of the suit, the plaintiff had taken out his naturalization papers. The dates are not given, but I gather that the naturalization papers were taken out after the filing of the petition for removal, and before the amended petition for removal was filed, and probably for the purpose of defeating the removal asked for in the defective petition. If these be the facts as the Court regarded the petition as amendable, it was undoubtedly a case for removal, for the Courts could not permit a change of citizenship after proceedings were commenced to remove, defective though they might be.

This case has been pending more than three years and a half, during which the plaintiff has been endeavoring to force the defendant to a trial, and if now remanded back it could not be heard before next fall. Owing to the rotation of the judges from room to room, and to skillful tactics in that behalf, he has so far postponed a hearing of it.

An early hearing of this case is important for the plaintiff. There is now due her over $65,000, upon negotiable notes admitted to have been given her, which is increasing at the rate of $3,000 per annum, and the supersedeas bond is but $10,000, and does not grow with the interest on the notes. My remembrance is that the judge, who fixed the amount of the supersedeas bond, fixed it so low, because the question could be heard upon motion early in the term. He knew nothing of the case, and it had no reference to its merits or character. If the hearing of this question is to be postponed till the case is reached on the docket, it cannot be heard at the trial Court within the next three years, and it will then have been pending nearly seven years with active efforts against delay, before it can be heard. It is therefore hoped that the Court will pass upon it at the earliest practicable moment.

All of which is respectfully submitted,

LINCOLN, STEPHENS & SLATTERY,
O'CONNOR, GLIDDEN & BURGOYNE,
Counsel for the Defendant in Error.

A SHORT REPLY TO APPELLANT'S BRIEF.

On the 25th of November last, we served a notice upon the appellant's counsel to dismiss this appeal, with a copy of the foregoing brief. Several efforts have since been made to submit the case upon the motion to dismiss or confirm, which, for various reasons have been postponed, (chiefly on account of engagements of counsel,) when a stipulation was entered into to advance the cause and submit it for the 2nd of April, then the 16th, and now the 23d, which stipulations are printed and attached hereto.

In the stipulation, the printing of the record, except so far as it appears in the foregoing brief and in this stipulation, is waived. The record bearing on the first question presented is long, and it did not seem to me to be of any importance, for the reason that nothing which the Superior Court of Cincinnati could have ordered upon the various motions, pleas and demurrers, could prolong the time of removal. We print herewith the amended petition and the so-called supplemental petition, to show that the latter set up no new cause of action, and has the operation stated by me in my brief on pages 25 and 26. Also the third, fourth and fifth defenses of the amended answer, to show that the fifth defense raised no new issue, as stated by me on page 29, being really the

general issue, as is determined in the late case of *Simmons* v. *Green*, 35 Ohio St. R., 104, 107. *See brief, p*, 29.

I have, this 12th of April, received the brief of appellants, and have hastily read it. Being engaged with Judge Hoadly and Mr. McDougall in a much litigated case in the Circuit Court of the United States I have no time to reply to it had I any desire to do so.

We claim that the act of March 3, 1875, must receive a different construction upon the point in issue as to citizenship, from the 12th Sec. of the act of the 24th of September, 1789, and that it has received such construction.

As to the remark of Mr. Justice Bradley in *Houser* v. *Clayton*, to-wit: that the construction which we contend for "would involve a shifting and changing of jurisdiction;" with great respect to the learned judge, I say: that it ought not apply to our case. Mrs. Bruce's removal from New York has not had the effect to *change* or *defeat* the jurisdiction of any court that had such jurisdiction. It is Gibson, the appellant, that is endeavoring to defeat the jurisdiction of the state court already acquired.

And I confess that I do not fully comprehend, how, when it is admitted that a person may change his citizenship for the very purpose of giving the United States Court jurisdiction, and thus defeating the state court of the jurisdiction it would have had

except for such change, the like change would not operate to defeat such jurisdiction. *See*

Cooper v. *Galbraith*, 3 Wash., 546.

Devou v. *Sharp*, 4 Wash., 609.

Molan v. *Torrence*, 9 Wheat., 537.

I do not see how the change of citizenship made for no such purpose, or even if made for that very purpose, at a time when the United States Court had no jurisdiction (for such was the case until the filing of the petition for removal in the state court), could defeat the state court of a jurisdiction properly acquired and till then held.

It is not like the case of *Clarke* v. *Mattherson*, 12 Pets., 170, for there the Circuit Court had rightfully acquired jurisdiction, before the parties became citizens of the same state, which is not the case here.

It is said that the first question made in the foregoing brief is not before the court, for the reason that Judge Baxter did not pass upon it; but the question arises upon the record and Judge Baxter might have passed upon it. He could have raised it *sua sponte*. The same is true of this court, that is now called upon to consider it.

Wood v. *Mann*, 1 Sumn., 580.

Jackson v. *Ashton*, 8 Pets., 149.

Mrs. Bruce's failure to raise it in the Circuit Court is not a waiver of the want of jurisdiction. Want of

jurisdiction of a case which appears upon the record cannot be waived by the parties.

Jackson v. *Ashton*, 8 Pets., 149.

The case of *French* v. *Hay*, 22 Wall., 244, does not apply, for it does not appear whether the want of jurisdiction was, in fact, shown by the record in that case; and there the parties had appeared and taken many proceedings in the Circuit Court of the United States, not denying the jurisdiction but admitting in so far as they could admit the jurisdiction.

Here no steps were taken admitting, by application, even, the jurisdiction of the Circuit Court of the United States. As soon as the question could be raised, the want of jurisdiction was insisted upon. The appellants have lost nothing and been put to no inconvenience or expenses by our not specially raising that question before the Circuit Court. Indeed my associate and myself were about to raise it, when Judge Baxter stated it was wholly unnecessary as the other point was conclusive.

The case of *Taylor* v. *Longworth*, 14 Pets., 174, is referred to as authority in the opinion of the court in *French* v. *Hay*, 22 Wal., 244. It was a case where Taylor having a personal privilege of being tried in the district where he resided, neglected to plead it and went on with the suit. A personal privilege may no doubt be waived.

But in the case before the court there has been no waiver; the want of jurisdiction of the United States Court was insisted upon in the state court even and at once raised in the Circuit Court.

The plea in abatement was filed to bring facts not upon the record upon it. That is the proper course in law cases, as Gibson had sworn, in his petition for removal, that Mrs. Bruce was a citizen of New York, at the time of filing his petition for removal. The record, as it then stood, did not show the real facts, indeed expressly showed the contrary, and the plea in abatement was filed to spread that question upon the record and to enable the court to hear it. The fact of fifteen terms of the Superior Court having intervened is shown upon the record. This Court takes judicial notice of the laws of Ohio, and they present the question. which fully appears upon the record, and nothing that the appellees did or could have done entitles the appellant to claim that the question has been waived.

The order of the Circuit Court was to remand the case to the State Court. Will this Court reverse that order, when the record clearly shows that the Circuit Court had no jurisdiction and that the state court was deprived of its jurisdiction by a false allegation in the petition for removal as to citizenship, a fact

which the record shows the appellee endeavored to raise in the state court?

If there was any good ground to sustain the order for remanding the case to the state court which appears in the record, this court will not reverse, even should it differ with the learned judge of the Circuit Court.

While I have no fear that this Court will differ with that learned judge, yet we insist that there has been no waiver of the other question which is presented by the facts of the record.

All of which is respectfully submitted.

LINCOLN, STEPHENS & SLATTERY,
O'CONNOR, GLIDDEN & BURGOYNE,
Counsel for Appellees.

We print herewith the opinion of JUDGE BAXTER, delivered upon remanding the case, and which is found in the 9 FED. REP. 540.

Judge Baxter's Opinion

This suit was commenced in the superior court of Cincinnati, April 12, 1879. When the pleadings were concluded, and an issue reached in March, 1881, it was, upon defendant's petition alleging that at the commencement of the suit, as well as at the time of the filing of his petition, the plaintiff was a citizen of New York and defendant a citizen of Ohio, removed into this court for trial. But the plaintiff, by plea filed here, says that at the time defendant filed his petition for the removal of the case she was a citizen of Ohio. The issue thus made was, by consent of the parties, tried by the court. From the evidence adduced we find that, at the commencement of the suit, the plaintiff was a citizen of New York, but that at the time defendant applied to have it removed, and for 17 months prior thereto, she was a citizen, with defendant, of the state of Ohio. Upon this finding the plaintiff moves to remand the case to the state court.

The controversy has been sharply defined by the arguments of counsel. On the one side it is insisted that the right of removal depends upon the *status* of the parties at the commencement of the suit, while on the other the contention is that the *status* of the parties at the time the application was made must control. This question has never been decided by the supreme court. Though twice raised in argument before that tribunal it was on each occasion reserved for future consideration, (*Ins. Co.* v. *Pechner*, 95 U. S. 183; *Bondurant* v. *Bondurant*, 103 U. S. 285,) hence we have to look to other sources for adjudications to aid us in arriving at a correct conclusion.

But on referring to the judgments of the inferior courts we find a conflict of opinion that tends rather to embarrass than to elucidate the problem. They are as wide apart as are the arguments of counsel in this case—Mr. Justice Bradley and others holding that a case cannot be removed from a state to a federal court, under the act of 1875, unless the petition for its removal shows that the required diversity of citizenship existed at the commencement of the suit. *Houser* v. *Clayton*, 3 Wood, 273; *Beede* v. *Cheeney*, 5 FED. REP. 388; *Tapley* v. *Martin*, 116 Mass. 276; *Holden* v. *Ins. Co.*, 46 N. Y. 1; *Ind. R. Co.* v. *Risley*, 50 Ind. 60. Whereas, Mr. Justice Wood and others hold that under the act the petition need not aver that the parties were citizens of different states at the time the suit was brought. If it shows the required citizenship when the petition is filed it will be sufficient. *Jackson* v. *Ins. Co.*, 3 Wood. 413; *Curtin* v. *Decker*, 5 FED. REP. 385; 33 Ohio St. 280; *Phœnix Life Ins. Co.* v. *Seattle*, 7 Cent. Law J. 398; Dillon, Removal of Causes, § 87.

These discordant decisions cannot be harmonized. It is, however, some mitigation to say that the conflict is confined to a difference of opinion touching the construction of the act of 1875. The controversy, thus restricted, is not as broad as the question in this case. We may concede the construction contended for in the line of decision first above referred to, to-wit: that a suit cannot be removed under the act of 1875 on the ground of a diversity of citizenship of the parties, unless they were citizens of different states at the commencement of the suit; and yet it would not follow that such suit could be removed on that ground after parties had become citizens of the state in which the suit is pending.

The reason for this is obvious. The national government is a government of defined and limited powers, and cannot lawfully exercise any authority except such as is expressly or impliedly conferred by the constitution. Its judicial powers are especially and specifically enumerated in that instrument. Among others, it is invested with jurisdiction of all controversies in law and equity between citizens of different states, to execute which congress has, from 1789 to 1875, enacted statutes authorizing and providing for the removal of such

cases from state to federal courts, which statutes have been uniformly recognized as valid and enforced by the courts. But no one contends that the federal courts can be authorized to divest a state court of its jurisdiction, once regularly acquired, of a suit between citizens of the same state, unless it involves title to lands claimed to have been acquired from different states, or affects embassadors, ministers, or consuls, or is a case arising under the constitution or a law of the United States. Any statute professing to authorize such a transfer of such suit would be an encroachment upon the reserved rights of the state, in conflict with the national constitution, and void. And yet this is, in effect, the principle contended for in this case. It is true, the plaintiff and defendant were citizens of different states when the suit was begun, and it is clear that as long as this diversity of citizenship continued the suit was removable under said act; and had defendant availed himself of his right to remove it in time, the jurisdiction of this court could not have been divested or its efficiency impaired by any subsequent action of the plaintiff. But defendant took no steps for its removal until after the plaintiff became a citizen of Ohio. We think his application for the removal came too late. The act of 1875 is not susceptible of the construction contended for by defendant. If it was so expressly provided upon its face, it would, to that extent, exceed the constitutional authority of the legislative department, and would, therefore, be void.

The case will be remanded and judgment entered against defendant for the costs of this court.

NOTE.—After reading the above opinion, the learned Judge remarked that he had not examined or passed upon the other question as to the time of removal involved in the record.

12444 N.J. 108-564

IN THE SUPREME COURT OF THE UNITED STATES.

THE NEW JERSEY ZINC COMPANY,

vs.

CHARLES W. TROTTER.

On Writ of Error.

RETURNABLE OCTOBER TERM, 1881.

COPY OF JUDGMENT ROLL,

BROUGHT UP BY WRIT OF ERROR.

NEWARK, N. J.:
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1883.

108-50

WARD & TICHENOR, Law Case Printers, 832 & 834 Broad Street, Newark, N. J.

United States Circuit Court.

DISTRICT OF NEW JERSEY.

CHARLES W. TROTTER,

vs.

THE NEW JERSEY ZINC COMPANY.

In Trespass.

Judgment on Verdict.

CORTLANDT & R. WAYNE PARKER, Attorneys.

As yet of the twelfth day of May, A.D. eighteen hundred and seventy nine.

Witness:

JOHN T. NIXON, *Judge.*

S. D. OLIPHANT, *Clerk.*

DISTRICT OF NEW JERSEY, *ss:*

The New Jersey Zinc Company, the defendant in this suit, a corporation and citizen of the State of New Jersey, was summoned to answer unto Charles W. Trotter, a citizen of the State of New York, the plaintiff therein, of a plea of trespass, and thereupon the plaintiff by McCarter & Keen, his attorneys, complains for that the said defendant on the first day of December, eighteen hundred seventy-eight, and on divers other days and times between that day and the commencement of this suit, at the township of Hardyston in the county of Sussex, in said district, with force and arms, &c., broke and entered the close of the plaintiff there situate, being a mine or vein of franklinite ore, and described as follows, viz., All that certain westerly mine, vein, lode and bed of franklinite ore, situate on the south part of the north part of Mine Hill in the said township of Hardyston, bounded

and described as follows, to wit, commencing at the boundary line between the north and south half part of Mine Hill (so called); from thence running northerly along the line of said westerly vein or bed of franklinite ore, five hundred feet; and then and there on the days and times aforesaid, forcibly dug up and blasted out of said vein or veins of plaintiff a large quantity, to wit, two hundred tons of franklinite ore of great value, to wit, of the value of one thousand dollars, and carried the same away and converted and disposed thereof to its own use.

And also further, the said defendant afterwards, to wit, on the day and year first aforesaid, at the place within the district aforesaid, with force and arms, &c., seized, took and carried away a lrage quantity, to wit, two hundred tons of franklinite ore, of the goods and chattels of the said plaintiff then and there found, and being of great value, to wit, of the value of one thousand dollars, and converted and disposed thereof to its own use.

And other wrongs to the plaintiff, then and there did to the damage of the plaintiff of one thousand dollars, and therefore he brings his suit, &c.

And the said defendants by B Williamson, their attorney, come and defend the force and injury, when, &c., and say that they are not guilty of the said supposed trespasses above laid to their charge, or any or either of them, or any part thereof, in manner and form as the said plaintiff hath above thereof complained against the defendants.

And of this, the said defendants put themselves upon the country; and the plaintiff doth the like.

UNITED STATES CIRCUIT COURT.

CHARLES W. TROTTER,
vs.
THE NEW JERSEY ZINC COMPANY.
} *In Trespass.*

Application being made on notice duly given for an amendment of the declaration filed in this cause as hereinafter contained, and the Court having considered said application, and being of opinion that said amendment ought to be made, it is thereupon on this seventeenth day of February, one thousand eight hundred and eighty-one, on motion of Cortlandt & R. Wayne Parker, attorneys of the plaintiff, that said declaration and the writ of summons issued in this cause be amended by inserting therein respectively the sum of five thousand dollars as damages, instead of one thousand dollars; and also by inserting therein the following count additional to those already contained in said declaration, that is to say—

"And also for that the said defendant afterwards, to wit, on the day and year first aforesaid, at the place and within the district aforesaid, with force and arms, &c., broke and entered a certain other close of said plaintiff there situate, being another mine or vein of franklinite ore, together with all the spurs, offshutes, dips and angles thereof, and all the franklinite ore therein contained, situate on the north part of the north half of Mine Hill, at Franklin Furnace, in the township of Hardyston, county of Sussex, State of New Jersey, bounded and described as follows, to wit, commencing at a point five hundred feet northerly of the boundary line between the north and south mine, so called; from thence running northerly along the line of the westerly vein or bed of franklinite ore, five hundred and seventy-four feet to the Hamburgh road, be the same more or less; and then and there on the days and years aforesaid, forcibly dug up, blasted out, mined and took from said vein or mine

of the plaintiff in this count mentioned, a large quantity, to wit, fifteen hundred tons of franklinite ore of great value, to wit, of the value of five thousand dollars; and took and carried the same away and then and there converted the same to their own use."

Ordered *nunc pro tunc*, this 29th day of November, A.D. 1881.

JNO. T. NIXON, *J.*

Afterwards, that is to say, on the sixth day of April, in the year eighteen hundred and eighty-one, before the said Court, come as well the within named Charles W. Trotter, as well the within named The New Jersey Zinc Company, by their respective attorneys within named, and the jurors of the jury being summoned also come, who, to speak the truth of the matters within contained, being chosen, tried and sworn, say upon their oath, they are not prepared to establish substantially any or either of the parallelograms projected either by the defendant or the plaintiff, the deed and the evidence not warranting them so to do, and that they are not able to establish a parallelogram under the evidence, and that they find the defendant guilty of the trespasses laid to its charge in manner and form as the said Charles W. Trotter hath within complained against them, and they assess the damages of the said Charles W. Trotter by reason thereof, over and above his costs and charges by him about his suit in this behalf expended, to three thousand three hundred and twenty dollars, and for those costs and charges to seven hundred and fifty-two dollars and twenty-five cents.

Therefore it is considered that the said Charles W. Trotter do recover against the said The New Jersey Zinc Company his said damages, costs and charges by the jurors aforesaid, in form aforesaid assessed, which said

damages, costs and charges in the whole amount to four thousand and seventy-two dollars and twenty-five cents.

And the said The New Jersey Zinc Company in mercy, &c.

Judgment signed this sixth day of April, A.D. eighteen hundred and eighty-one.

JNO. T. NIXON, *Judge.*

ORDER TO SHOW CAUSE FOR NEW TRIAL.

It is ordered by the Court on motion of the defendant's attorney, that the plaintiff show cause before this Court why the verdict rendered by the jury in this cause should not be set aside and a new trial granted, and that the defendant bring on the argument of said rule to show cause according to the rules and practice of this Court.

ORDER DISCHARGING RULE.

On rule to show cause why a new trial should not be had, &c.

This matter having been duly argued before the Court and considered, it is now on this 28th day of March, 1882, ordered that the rule to show cause heretofore granted, be discharged with costs.

On motion of

CORTLANDT & R. WAYNE PARKER,

Att'ys of Plaintiff.

By the Court.

ORDER AS TO EXCEPTIONS.

On motion made by the plaintiff to quash or cancel the bill of exceptions signed in this cause, or for such order as might be proper, and argument by Richard Wayne Parker of counsel for the plaintiff, and Benjamin Williamson and John Linn of counsel for the defendants.

It is ordered by the Court that the motion to quash and cancel said exceptions be denied, and it is further

ordered that the rule to show cause why a new trial should not be granted in this cause, the reasons filed thereon, and the order discharging said rule be and they are hereby made part of the record in this cause, and be returned therewith on the writ of error sued out herein, with this order.

And it is further ordered that proofs may be taken as to the statutes, rules and practice of the State Courts of New Jersey on motion for new trial and the effect thereof.

JNO. T. NIXON, *J.*

Let this order be entered as of the 17th day of July, 1882.

JNO. T. NIXON, *J.*

DEFENDANT'S AFFIDAVITS AS TO VALUE.

Examination of witnesses on the part of the above named defendant in the Circuit Court of the United States, District of New Jersey, wherein Charles W. Trotter is plaintiff, and The New Jersey Zinc Company is defendant, taken at the office of Linn & Babbitt, No. 47 Montgomery street, Jersey City, New Jersey, on Saturday, the twenty-ninth day of July, in the year of our Lord one thousand eight hundred and eighty-two, before J. Herbert Potts, a Notary Public in and for the State of New Jersey, in the presence of R. Wayne Parker counsel for the said plaintiff, and John Linn counsel for the said defendant.

Counsel for plaintiff objects taking affidavits in this cause.

GEORGE H. COOK, a witness produced on the part of the defendant, being sworn, says: I reside in New Brunswick in this State; I am familiar with what is known as Mine Hill, Sussex county, and with the character of the ores in that hill and that locality; I am familiar with the workings of the New Jersey Zinc Company on the west vein of Mine Hill, extending from the Hamburgh road south, from five to seven hundred feet; there is no one

working there in that locality now; Mr. Trotter is working in the immediate south of that point.

Q Do you know what is the value of the franklinite and zinc ores upon this westerly vein, extending from the Hamburgh road south, about five hundred and seventy-five feet, excepting only the red oxide of zinc?

(Question objected to as immaterial.)

A I have some idea as to its value; I have looked over the ground and have been familiar with the working of the mines there for twenty years past, and from the prices at which such ores sell now, making a liberal allowance, I should think it worth a hundred thousand dollars or more.

(Counsel for plaintiff announces that he does not desire to cross-examine the witness.)

Taken, sworn to and subscribed before me, a Notary Public of New Jersey, this 29th day of July, A.D. 1882, at Jersey City, New Jersey,

GEO. H. COOK.

J. HERBERT POTTS,
Notary Public of New Jersey.

EDWARD BAKER, a witness produced on the part of the defendant, being sworn, says: I was formerly president of the New Jersey Zinc Company; I am familiar with the property in dispute in this cause.

Q What, in your judgment, is the value of the property referred to in my question to the former witness, Doctor Cook?

(Question objected to as immaterial.)

A I think, at least, seventy-five thousand dollars; I would be willing to give that amount for it now if I could have a conveyance of it and a good title.

And being *cross-examined*, witness says: It is a very difficult matter to say what a property like that is worth; it might be very cheap at the price I named, and it might be very dear; it is full of water up to a certain level; the ore is uniform; it is not uniform in all parts, and it

varies in width or thickness; the vein was left in good running condition.

Re-direct:

And being re-examined in chief, witness says: The vein, from the best of my recollection, runs from three to ten feet in width, in extremes.

Taken, sworn to and subscribed before me, a Notary Public of New Jersey, this 29th day of July, A.D. 1882, at Jersey City, New Jersey, } EDW. BAKER.

J. HERBERT POTTS,
Notary Public of New Jersey.

AFFIDAVITS AS TO NEW JERSEY PRACTICE.

Examination of witnesses, etc., taken before me in the above cause, at my office in the city of Newark, on Saturday, 2d December, 1882, at 10 o'clock, A.M., in presence of C & R. W. Parker, attorneys of plaintiff, and John Linn, attorney of the defendant, under an order entered therein, as of 17th July, 1882, that proof may be taken as to the statutes, rules and practice of the State Courts of New Jersey, on motion for new trial, and the effect thereof, on part of the plaintiff.

W. PATERSON,
U. S. Com'r, District of N. J.

Counsel for plaintiff produces a notice of taking this testimony, service whereof was acknowledged.

DISTRICT OF NEW JERSEY, } *ss:*
COUNTY OF ESSEX, }

RICHARD WAYNE PARKER deposes and says: I am a counsellor-at-law of the Courts of New Jersey, and in cases in those Courts; have had occasion to inform myself as to their practice on motion for new trial. The Supreme Court of New Jersey is the principal Court of civil jurisdiction in actions at law, and its rules and practice as to new trial, so far as referred to herein, gov-

ern in the other Superior Courts of the State. The 42d rule was adopted before 1868, and is as follows:

"Where the party holding a bill or bills of exceptions applies for a rule to show cause why a new trial shall not be granted, the granting thereof shall be a waiver of all bills of exceptions except on points expressly reserved in said rule. Rules to show cause may be special, in the discretion of the Court, and then the case shall be heard and decided on the grounds upon which rule was allowed."

By the statutes of New Jersey, entitled "An act to regulate the Practice of Courts of Law," Revision, approved 27th March, 1874, Sec. 246, it was provided as follows:

"Where the party holding a bill or bills of exceptions applies for a rule to show cause why a new trial should not be granted, the granting thereof shall be a waiver of all bills of exceptions, except on points expressly reserved in said rule; a rule to show cause why a new trial should not be granted may be special, in the discretion of the Court, and then the case shall be heard and decided on the grounds upon which the rule was allowed."

I produce Nixon's Digest, containing said rules, and authorized copy of the Revision of the statutes. Likewise the three reported cases, *Meeker* vs. *Boylan*, 3 Dutcher, 262; *Mann* vs. *Glover*, 2 Green, 195; *Ogden* vs. *Gibbons*, 2 Southard, 853. I understand these printed Reports give the practice of the State on the point referred to in the order, and offer them in evidence.

By Mr. Linn:

× *Q 1.* Do you understand it to be the established and invariable practice of the Supreme Court of New Jersey, that a rule to show cause for a new trial may not be granted without requiring the party in whose favor it is so granted, to waive any exceptions taken on the trial of the cause?

A No; the rule and statute provide that exceptions may be reserved specially, by a special rule *nisi*, in the discretion of the Court; but if a general rule for a new

trial be taken without such reservation, it is the invariable and long settled practice, now confirmed by statute, that all exceptions thereby are waived.

× *Q 2.* Have you known of no instances in New Jersey where exceptions have been taken on the trial and a rule to show cause, general in its terms, afterward was granted without it being regarded as an absolute waiver of the exceptions taken on trial?

A I have known of none, certainly not since the adoption of the rule of Court referred to; the practice I understand to have been settled fully and invariable since then.

× *Q 3.* Do you know of no instance in the practice of New Jersey, where, since the adoption of the rule you have referred to, after the granting of a rule to show cause, general in terms, exceptions taken at the trial were allowed to be brought by a writ of error before the Court of Errors and Appeals, the Court of last resort in the State, and argued and determined then?

A I have known of none?

× *Q 4.* According to the practice in New Jersey, may not the Court entertain a writ of error bringing up exceptions taken at the trial after a rule to show cause has been granted, general in terms?

A As I understand it they will not consider any such exceptions upon such a writ.

× *Q 5.* Do you understand that they have not the power if so disposed?

A I have testified as to the practice of the Court, and that to my knowledge they never have exercised any such power, but have established a practice, so far as I know, unvarying to the contrary; in my judgment they cannot notice any such exceptions, as the latter are not in the record, having been waived upon facts by granting a general rule; if presented the Court in Error have full power to quash them as irregular.

(Signed,) RICHARD WAYNE PARKER.

Sworn and subscribed, this second December, 1882, before me,

W. PATERSON, *U. S. Com'r, Dist. N. J.*

DISTRICT OF NEW JERSEY, *ss:*

I, William Paterson, U. S. Commissioner for said district, hereby do certify that the foregoing deposition was taken before me as stated therein, as witness my hand and seal, this second December, 1882.

[L. S.] W. PATERSON,
U. S. Commissioner.

Examination of witnesses on the part of the defendant above named, (the plaintiff in error,) in said cause depending in the United States Circuit Court, District of New Jersey, taken under the order hereto annexed, at the office of Linn & Babbitt, in the city of Jersey City, New Jersey, on Monday, the eighteenth day of December, in the year of our Lord eighteen hundred and eighty-two, before J. Herbert Potts, a Notary Public of New Jersey, in the presence of John Linn, Esq., of counsel for defendant, and Richard Wayne Parker, of counsel for plaintiff.

R. WAYNE PARKER, a witness on the part of the defendant, the plaintiff in error, being sworn, says: I was not present in Court at the time the rule to show cause was granted in this case, at least, I do not remember it; I was present at the time of the argument of the motion for an order to strike from the files the bill of exceptions on which motion the order was made, under which this testimony is taken.

Q Do you recollect that upon the argument of that motion, or upon its being denied by the Court, that the Judge stated that he intended the defendant should have the benefit of their exceptions taken on the trial, and that he did not mean to require them to waive their exceptions upon his granting the rule to show cause why a new trial should not be had?

A As counsel, I ought to object or take the objections that the conversation between counsel and the Court at an argument, is not material; I do not recollect that the Judge used the words recited in the question; as nearly as I can recollect after this lapse of time, he

did say, substantially, that when the rule was granted he did not think or it did not strike him that the exceptions were thereby waived; I cannot be positive about the words; I understood from what he said, substantially, that there had been nothing said about that matter either one way or the other at the time of the granting of the rule, and that the rule was simply applied for and granted, and that he disclaimed any intention on his part in reference to the matter.

(Signed,) RICHARD WAYNE PARKER.

Taken, sworn to, and subscribed before me, a Notary Public of New Jersey, at Jersey City, this 18th day of December, A.D. 1882.

[L. S.] J. HERBERT POTTS,
Notary Public of New Jersey.

JOHN LINN, a witness on the part of the defendant, the plaintiff in error, being sworn, says: I was one of the counsel for the New Jersey Zinc Company in this suit, and was present at the time the rule to show cause was granted; it was general in its character as appears by the record, and the defendants were not required to waive any exceptions which had been taken at the trial; nothing whatever was said about such waiver or about the exceptions; the exceptions were regularly taken and allowed by the Court in the progress of the trial of the cause, but were not actually signed and sealed by the Judge until after the argument of the rule to show cause

And being *cross-examined*, by Mr. Parker, witness says: I think the exceptions were signed and sealed before the taking of the writ of error, and without any notice to the opposite counsel.

Taken, sworn to and subscribed before me, a Notary Public of New Jersey, at Jersey City, this 18th day of December, A.D. 1882, } JNO. LINN.

[L S.] J. HERBERT POTTS,
Notary Public of New Jersey.

108-564

OFFICE OF THE CLERK
SUPREME COURT U.S.
FILED
APR 16 1889
JAMES H. McKENNEY, CLERK

IN THE SUPREME COURT OF THE UNITED STATES.

THE NEW JERSEY ZINC COMPANY

vs.

CHARLES W. TROTTER.

No 1244

In error to the judgment of the Circuit Court for the District of New Jersey.

BRIEF

On motion to dismiss for want of jurisdiction and to affirm the judgment appealed from for entire absence of error in the record.

CORTLANDT PARKER,
RICHARD WAYNE PARKER,
Of Counsel with Charles W. Trotter, Respondent.

1. Motion to dismiss because the writ of error is to a judgment at law for damages in trespass for less than $5,000.

2. Motion to affirm because a general rule nisi for new trial was taken in the court below, and by the state practice and statutes of New Jersey, as adopted in the said court, to wit, the Circuit Court of the United States for the District of New Jersey, the obtaining of such rule is ipso facto a waiver of all the exceptions relied on by the appellant, and there is nothing before this court that can be alleged for error.

did say, substantially, that when the rule was granted he did not think or it did not strike him that the exceptions were thereby waived; I cannot be positive about the words; I understood from what he said, substantially, that there had been nothing said about that matter either one way or the other at the time of the granting of the rule, and that the rule was simply applied for and granted, and that he disclaimed any intention on his part in reference to the matter.

(Signed,) RICHARD WAYNE PARKER.

Taken, sworn to, and subscribed before me, a Notary Public of New Jersey, at Jersey City, this 18th day of December, A.D. 1882.

[L. S.] J. HERBERT POTTS,
Notary Public of New Jersey.

JOHN LINN, a witness on the part of the defendant, the plaintiff in error, being sworn, says: I was one of the counsel for the New Jersey Zinc Company in this suit, and was present at the time the rule to show cause was granted; it was general in its character as appears by the record, and the defendants were not required to waive any exceptions which had been taken at the trial; nothing whatever was said about such waiver or about the exceptions; the exceptions were regularly taken and allowed by the Court in the progress of the trial of the cause, but were not actually signed and sealed by the Judge until after the argument of the rule to show cause

And being *cross-examined*, by Mr. Parker, witness says: I think the exceptions were signed and sealed before the taking of the writ of error, and without any notice to the opposite counsel.

Taken, sworn to and subscribed before me, a Notary Public of New Jersey, at Jersey City, this 18th day of December, A.D. 1882, } JNO. LINN.

[L S.] J. HERBERT POTTS,
Notary Public of New Jersey.

108-564

SUPREME COURT U.S.
APR 16 1923
JAMES H. MCKENNEY, CLERK

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On motion to dismiss for want of jurisdiction and to affirm the judgment appealed from for entire absence of error in the record.

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1. Motion to dismiss because the writ of error is to a judgment at law for damages in trespass for less than $5,000.

2. Motion to affirm because a general rule nisi for new trial was taken in the court below, and by the state practice and statutes of New Jersey, as adopted in the said court, to wit, the Circuit Court of the United States for the District of New Jersey, the obtaining of such rule is ipso facto a waiver of all the exceptions relied on by the appellant, and there is nothing before this court that can be alleged for error.

HOLBROOKS' STEAM PRINTERY, 11 Mechanic St., Newark, N. J.

IN THE SUPREME COURT OF THE UNITED STATES.

THE NEW JERSEY ZINC COMPANY,
Plaintiff in Error,
vs.
CHARLES W. TROTTER,
Defendant in Error.
} *In Error.*

The appellee, Charles W. Trotter, moves the court to dismiss the writ of error in the above stated cause on the ground that the amount in controversy is not sufficient to give the court jurisdiction.

He also unites with this motion a motion to affirm the judgment of the Circuit Court for the District of New Jersey, mentioned in the writ, on the ground that according to the practice of that court all exceptions have been waived, and there is nothing before this court to determine on said writ of error.

CORTLANDT PARKER,
RICHARD WAYNE PARKER,
Of Counsel for Charles W. Trotter.

Take notice that three weeks after service hereof the above motion will be submitted to the Supreme Court of the United States on the grounds set forth in the accompanying brief.

RICHARD WAYNE PARKER.

I. BRIEF ON MOTION TO DISMISS.

This was an action at law of TRESPASS FOR DAMAGES, *quare clausum fregit* and *de bonis asportatis*, for digging and carrying away ore. The verdict was that the defendant was guilty of the trespasses laid, and the plaintiff's damages were assessed at $3,320.00, besides costs.

Judgment was thereon entered that Charles W. Trotter do recover his said damages, costs and charges, which said damages, costs and charges in the whole amount to four thousand seventy-two dollars and twenty-five cents. The judgment is for damages only.

The amount in controversy is not over five thousand dollars, and there is no jurisdiction in this court.

But the plaintiffs in error allege that the suit and judgment may incidentally affect the title of the close or *locus in quo* in some subsequent proceeding by way of estoppel, and bring affidavits that the value of that close is more than five thousand dollars.

It is settled that in a suit and judgment for damages the amount recovered or sued for is the amount in dispute, and nothing else. Affidavits are not admissible in such a suit, but only when specific property is sought to be recovered, to determine its value. This action was to recover money, not to recover specific property.

It is settled that the value of the thing recovered, or sought to be recovered, is the amount in dispute. Where the suit and recovery is of money the damages laid or recovered determine that amount, and finally. This is the case here, and the damages recovered are not over $5,000.

That the title to land may be affected by way of estoppel is of no importance, and the principle is so settled by the decision in Town of Elgin vs. Marshall (1882, October term, No. 803). There the plaintiff sued on coupons of bonds, which the defendant claimed to be illegally issued, and recovered a judgment under $5,000. *It was part of the finding that he was owner of the bonds to the amount of $7,500.*

The court admit that the adjudication is conclusive by way of estoppel as to these bonds as between the parties.

But the court hold that the rule as to the sum or value of $5,000 has reference to the matter *directly* in dispute in the particular cause, and does not permit the court to estimate collateral effects, although that rule may exclude cases involving rights that are priceless. They hold that the rule must be construed with strictness and rigor, that jurisdiction should not be extended by doubtful constructions, and that ordinarily the money value would appear in the pleadings and judgment where the claim must be stated and determined.

And the court proceeds:

> The language of the rule limits, by its own force, the required valuation to the matter in dispute, in the particular action or suit in which the jurisdiction is invoked; and it plainly excludes, by a necessary implication, any estimate of value as to any matter not actually the subject of that litigation. It would be, clearly, a violation of the rule, to add to the value of the matter determined any estimate in money, by reason of the probative force of the judgment itself in some subsequent proceeding. That would often depend upon contingencies, and might be mere conjecture and speculation, while the statute evidently contemplated an actual and present value in money, determined by a mere inspection of the record. The value of the judgment, as an estoppel, depends upon whether it could be used in evidence in a subsequent action between the same parties; and yet, before the principal sum, in the present case, or any future instalments of interest shall have become due, the bonds may have been transferred to a stranger, for or against whom the present judgment would not be evidence. And in every such case, it would arise as a jurisdictional question, not how much is the value of the matter finally determined between the parties to the suit, but also, whether and in what circumstances, and to what extent, the judgment will conclude other controversies thereafter to arise between them, and thus require the trial and adjudication of issuable matter, both of law and fact, entirely extraneous to the actual litigation, and altogether in anticipation of further controversies, that may never arise. It is not the actual value of the judgment sought to be reviewed which confers jurisdiction, otherwise it might be required to hear evidence that it could not be collected; but it is the nominal or apparent sum or value of the subject matter of the judgment. It is impossible to foresee into what mazes of speculation and conjecture we may not be led by a departure from the simplicity of the statutory provision.
>
> Accordingly this court has uniformly been strict to adhere to and enforce it.
>
> In *Grant vs. McKee*, 1 *Peters*, 248, it refused to take jurisdiction, because the value of the premises, the title to which was involved in that action, was less than the jurisdictional limit, although they were part of a larger tract, held under one title, on which the recovery in ejectment had been obtained against several tenants, whose rights all depended on the same questions.
>
> *Stinson vs. Dousman*, 20 *How.*, 461, was an action at law for the recovery

of rent, where the claim and judgment against the defendant below were less than the amount required to give this court jurisdiction on a writ of error; but in giving judgment for the plaintiff below, for any sum at all, the court necessarily passed upon a defence of the defendant, set up by way of answer in the nature of a counter-claim, insisting upon an equitable right to a conveyance of the land, out of which it was alleged the rent issued, and the value of which was in excess of the limit required for the jurisdiction of the court. The effect of the judgment was to adjust the legal and equitable claims of the parties to the subject of the suit, which was, not merely the amount of the rent claimed, but the title of the respective parties to the land. On that ground alone the jurisdiction of the court was upheld.

Gray vs. Blanchard, 97 *U. S.*, 564, and *Tintsman vs. National Bank*, 100 *U. S.*, 6, are instances of the strict application of the rule limiting the jurisdiction to the amount actually in dispute in the suit; of which a similar example is found in *Parker vs. Morrill*, decided at the present term.

Indeed, so strictly has it been applied, that in cases where, although the entire matter in dispute in the suit exceeds in value the jurisdictional limit, nevertheless, if there are several and separate interests in that sum, belonging to distinct parties, and constituting distinct causes of action, although actually united in one suit and growing out of the same transaction, the jurisdiction of the court has been constantly denied. We have had occasion to repeat and apply this principle in several cases at the present term. *Ex-parte Baltimore & Ohio Railroad Company; Adams vs. Crittenden; Farmers' Loan & Trust Co. vs. Waterman; Schwed vs. Smith.* In some of these cases, the value of the matter in dispute, actually determined against the party invoking our appellate jurisdiction, actually was largely in excess of its limit, and yet its exercise was forbidden, because it was divided into distinct claims, no one of which was sufficient of itself to entitle either party to an appeal, although the decision in one was necessarily the same in all, because rendered upon precisely the same state of facts. *Russell vs. Stansell*, 105 *U. S.*, 303.

To entertain jurisdiction in the present case would be, in our opinion, to unsettle the principle of construction by which, in all the cases referred to, this court has been guided. The writ of error is accordingly

Dismissed for want of jurisdiction..

It is of no consequence that the verdict specially or generally found facts bearing on the title of the *locus in quo* where the trespasses were committed. There is no judgment as to that finding or otherwise than as to the damages laid. There could be none in such an action. The matter in dispute is those *trespasses* and the *damage* done thereby. This is the only matter directly in dispute in the cause—the only matter for which recovery is claimed, or had, and its value is determined by the amount of the judgment.

Just such a finding was contained in the case last cited. The

bonds were found to be there the plaintiff's property. But that was held immaterial, since he only *recovered* the interest.

It is only damages that Mr. Trotter is to get by this suit, and those are under $5,000.

Those damages only were the subject of dispute in the cause.

II. BRIEF ON MOTION TO AFFIRM.

We unite with our motion to dismiss a motion to affirm, which seems hardly necessary, so clear is the law on the motion to dismiss.

But we are certainly entitled to the affirmance.

WE MOVE TO AFFIRM BECAUSE THERE IS NO ERROR IN THE RECORD, ALL EXCEPTIONS HAVING BEEN WAIVED BY THE ACT OF THE APPELLANTS.

By the statutes of the United States the pleadings, practice forms and proceedings in actions at law are to conform as far as possible to those of the state courts.

By the state practice the application for and granting of a rule *nisi* for new trial is *ipso facto* a waiver of all exceptions, unless those exceptions be specially reserved.

The Supreme Court of New Jersey is the principal court of civil jurisdiction in actions at law, and its rules and practice as to new trials, so far as referred to herein, govern in the other superior courts of the state. The 42d rule was adopted before 1868, and is as follows:

"Where the party holding a bill or bills of exceptions applies for a rule to show cause why a new trial shall not be granted, the granting thereof shall be a waiver of all bills of exceptions, except on points expressly reserved in said rule. Rules to show cause may be special in the discretion of the court, and then the case shall be heard and decided on the grounds upon which the rule was allowed."

By the statute of New Jersey entitled "An act to regulate the practice of courts of law," revision approved 27th of March, 1874, section 246, it was provided as follows:

"Where the party holding a bill or bills of exceptions applies for a rule to show cause why a new trial should not be granted, the granting thereof shall be a waiver of all bills of exceptions, except on points expressly reserved in said rule: A rule to show cause why a new trial should not be granted, may be special in the discretion of the court, and then the case shall be heard and decided on the grounds upon which the rule was allowed."

Before the adoption of the rule and statute it had been usual to require the party to waive exception before granting an order *nisi*.

Meeker vs. Boylan, 3 Dutcher, N. J., 262.

Mann vs. Glover, 2 Green, 195.

Ogden vs. Gibbons, 2 Southard, 853.

But since the rule the waiver takes place as matter of practice by the order itself, unless the exceptions be specially reserved in the rule *nisi* for new trial.

See evidence in supplemental return.

In this case a general rule *nisi* for new trial was taken, no exceptions were reserved, and the case was argued on all the exceptions, and a new trial refused.

On writ of error being issued motion was made to quash the bill of exceptions. The motion was denied, but the court by order made the rule *nisi* for new trial, the reasons filed thereon, and the order discharging the rule part of the record in the cause so as to allow the question to be raised here.

On this branch of the cause we make the following points:

I.

All *practice* in the Circuit Court and prior to the granting of a writ of error is expressly and strictly governed by that of the state courts.

So as to the forms of action in Alabama, where another form of action took the place of ejectment.

Sears vs. Eastbourne, 10 Howard, 189.

So where by state law mandamus is proper to enforce collection of taxes.

U. S. vs. Keokuk, 6 Wallace, 514.

So where the state practice allows several actions on a joint contract.

Sawin vs. Kenny, 3 Otto, 290.

II.

The application and rule *nisi* for new trial and their effect on bills of exception are properly and purely *practice* in the Circuit Court and antecedent to any writ of error in the cause.

The form of the rule whether general or special, is purely such *practice*.

III.

By the practice the effect of accepting a general rule *nisi* is *ipso facto* and *by the act of the party* to waive all exceptions. The waiver is not the act of the court. No impediment is attempted to be thrown by the state practice on the *discretion* of the judge to save exceptions to the party by a *special* rule.

But if the party apply for and take a general rule, he—the party—thereby waives his exceptions as mere matter of practice.

We do not claim that state practice should govern the *discretion* of a United States judge in the matter of new trial.

In other states the waiver of exceptions is not affected *ipso facto* by the order *nisi*, but *may* be ordered by the circuit judge. A practice of enforcing such waiver may not control the discretion of a United States judge, as given him by the United States and bind him to order a waiver. But in New Jersey, while the discretion of the judge to save exceptions by special order is thoroughly reserved to him, the application for and obtaining of a rule *nisi* without reservation is *as matter of practice* a waiver by act of the party; and a commendable practice for prevention of delay and vexatious appeals.

IV.

The above principles are not at all in conflict with the rule that state statutes do not affect proceedings in this court or in error. Neither the bill of exceptions, nor the motion for new trial are such proceedings. They are in the court below, and there only. So is the rule *nisi* and the waiver effected thereby.

V.

In this case there is no foundation for the writ of error except the bill of exceptions. These are waived and gone. The rest of the record contains only the common pleadings, verdict and judgment in the usual form. The declaration has been stated. The plea was not guilty. The verdict was guilty with an assessment of damages on which judgment of recovery is entered.

VI.

The judgment should be affirmed and the record remanded.

CORTLANDT PARKER,
RICHARD WAYNE PARKER,
Of Counsel.

108-564

UNITED STATES SUPREME COURT

THE NEW JERSEY ZINC COMPANY,

Plaintiffs in Error,

VS.

CHARLES W. TROTTER,

Defendant in Error.

BRIEF OF PLAINTIFFS IN ERROR

On motion of defendant in error to dismiss the writ and affirm the judgment.

JOHN LINN,
Atty. of Pltffs. in Error.

JERSEY CITY:
J. J. Griffiths, Law Printer, 38 Montgomery St.
1883.

United States Supreme Court

The New Jersey Zinc Company, Plffs. in Error, vs. Charles W. Trotter, Deft. in Error.	In trespass.

BRIEF OF PLAINTIFFS IN ERROR

On motion of defendant in error to dismiss the writ and affirm the judgment.

I.

As to the Value of the Matter in Dispute.

This was an action of trespass brought by Charles W. Trotter against The New Jersey Zinc Company in the Circuit Court of the United States for the District of New Jersey.

The declaration as originally filed contained two counts, one for trespass *quare clausum fregit*, and the other for trespass *de bonis asportatis*, and the amount of damages claimed was one thousand dollars.

Upon the application of the plaintiff an amendment was allowed, adding another count *quare clausum fregit*, describing a different close from that mentioned in the first count of the declaration, and claiming damages to the amount of five thousand dollars.

To this declaration the defendants pleaded the general issue.

Under this plea, upon the trial of the cause, the defendants set up and claimed title to the second

close described, and almost the entire controversy in the cause was in reference to the ownership of this close. *The title to it was the principal matter in dispute.* It was just as much in dispute as if it had been specially pleaded, and every other fact in the case admitted against the defendants.

The amount of the damages claimed was also a matter in dispute between the parties, but it was not the principal matter. The title to this close was the principal matter *directly*, not *incidentally*, in dispute in this cause. The value of the few hundred tons of ore which had been taken away was of minor importance. The plaintiff claimed that the defendants had broken and entered his close and caused him damage in doing so. The defendants in answer to this claim of the plaintiff insisted that the close in question was their own close—their own property—that they had the true legal title to this close, and that the plaintiff had no title to it whatever. *This title then was the real matter in dispute between the parties in the cause.* This action was brought to establish the plaintiff's title to this close. To say that the amount of damages claimed was the matter in dispute is a mere evasion and a mockery. It was the title to this close which was directly litigated. It was upon the question of this title that almost the whole testimony in the cause was brought to bear. The value of the goods claimed by the plaintiff, under the count *de bonis asportatis*, as having been taken and disposed of by the defendants, determines the amount of *one* of the matters in dispute. But the value of the title which was directly in issue, and was the great cause of contention, measures the value of the principal matter in dispute between the parties.

The real and principal matter in dispute, then, being the title of the premises described in one of the counts of this declaration, and it not appearing clearly, as it could not, from the plaintiff's demand or the finding of the jury, what was the value of this title, affidavits have been taken on due notice to the

adverse party, and returned with the record to this Court, for the purpose of showing the value of the matter in dispute in the cause.

This practice is sanctioned by this Court.

Williamson v. Kincaid, 4 Dall. 20.
Course v. Stead, 4 Dall. 22.
Rush v. Parker, 5 Cranch 287.

It appears then by these affidavits that the value of the matter in dispute was at least seventy-five thousand dollars.

From all this it is clear, therefore, that the *matter in dispute* in this cause, exclusive of costs, exceeded the sum or value of five thousand dollars, and this, so far as the amount is concerned, gives to this Court jurisdiction to review the case upon writ of error.

II.

As to the Waiver of Exceptions.

It is, in the second place, insisted that this Court cannot entertain this case upon writ of error, because, as is claimed, the plaintiff in error in making an application to the Circuit Court for a rule *nisi* for a new trial, *ipso facto*, waived all exceptions taken at the trial.

It is claimed that inasmuch as a statute of New Jersey declares "where the party holding a bill or bills of exceptions applies for a rule to show cause why a new trial should not be granted, the granting thereof shall be a waiver of all bills of exceptions, except on points expressly reserved in said rule," therefore the plaintiff in error in this case is bound by it, and must be held to have waived all of their exceptions when they applied for a rule *nisi* for a new trial.

We humbly submit that such is not the law.

Section 914 of the Revised Statutes of the United

States declares that, "The practice, pleadings, and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the *Circuit* and *District* Courts, shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the Courts of record of the State within which such Circuit or District Courts are held, any rule of Court to the contrary notwithstanding."

Whatever may be the law and practice in New Jersey upon proceedings of like character in their State Courts, we submit that it can have no application to this Court.

The practice in *this* Court is in no respect whatever regulated by the practice in the State Courts. The section referred to, relates to the practice and forms and modes of proceeding in the *Circuit* and *District* Courts, and makes no mention of practice or modes of proceeding in the Supreme Court.

This subject of removing a cause from the Circuit Court to the Supreme Court by writ of error for review in this Court, is one which has been legislated upon by Congress, and is regulated by the laws of Congress, and by the established practice of this Court only. Section 691 of the U. S. Revised Statutes declares that *all final judgments of any Circuit Court* where the matter in dispute exceeds $5000 may be re-examined and reversed or affirmed in the Supreme Court upon a writ of error.

This statute is direct and positive. It secures to each party a substantial right, and no law of any State, nor any rule of practice in any State Court, even if applicable to such proceedings, can deprive a party of this substantial right.

But, it is claimed, that the plaintiffs in error in this case have waived their right to bring a writ of error, or have waived their exceptions taken on the trial, which leaves the case to stand here without any exceptions and without any ground for the assignment of errors.

How have they waived their exceptions? The reply is, by asking for a rule to show cause why a new trial should not be had.

The defendants did not so understand it. The Judge before whom the motion was made did not so understand it. The rule to show cause does not so state it. There is no waiver upon the record. The bills of exceptions were actually signed and sealed by the Judge after the argument of the rule to show cause.

A motion for a new trial is not a waiver of a writ of error, and will not be so considered unless the waiver is entered on the record.

U. S. v. Hodge, 6 Howard 279.

A State law regulating the signing of bills of exceptions, can have no influence on the practice of a Court of the United States, unless adopted by a rule of the Court. And if so adopted, it is always in the power of the Court to suspend it, or except a particular case from its operation, whenever the purposes of justice require it.

United States v. Breitling, 20 How. 254.

But it is claimed that the law of Congress requires the practice and forms and modes of proceeding of the Circuit Courts of the United States to conform to the practice and forms and modes of proceeding in the State Courts where such Circuit Courts are held, and therefore it is not in the power of the Circuit Courts to deal with such practice and proceedings as with their own rules.

But the requirement is that such practice and forms and modes of proceeding "shall conform *as near as may be*" to the practice of the State Courts.

This Court has had occasion to give construction, in several instances, to the language of this section.

In Nudd v. Burrows, 91 U. S. 441, the Court say, "The purpose of the provision is apparent upon its face. No analysis is necessary to reach it. It was

to bring about uniformity in the law of procedure in the Federal and State Courts of the same locality. It had its origin in the code enactments of many of the States. While in the Federal Tribunals the common law pleadings, forms and practice were adhered to, in the State Courts of the same district the simpler forms of the local code prevailed. This involved the necessity on the part of the bar of studying two distinct systems of remedial law, and of practising according to the wholly dissimilar requirements of both. The inconvenience of such a state of things is obvious. The evil was a serious one. It was the aim of the provision in question to remove it. This was done by bringing about the conformity in the Courts of the United States which it prescribes. The remedy was complete. * * * The identity required is to be in 'the practice, pleadings, and forms and modes of proceeding.' The personal conduct and administration of the Judge in the discharge of his separate functions is, in our judgment, neither practice, pleading, nor a form nor mode of proceeding, within the meaning of those terms as found in the context."

In the Indianapolis, &c., R. R. Co. v. Horst, 93 U. S. 299, the Court say, "The Court refused the motion of the defendant to instruct the jury to find specially upon particular questions of fact involved in the issues in the event they should find a general verdict."

"These questions of fact were submitted by the counsel for the defendant. Upon looking into them, we find they were nine in number. All of them related to the question of negligence on the part of the plaintiff. It is insisted that they were within the act of Congress of June 1, 1872, (17 stat. 197 sec. 5) and that hence the Court below erred in declining to require the jury to find in answer to them, in addition to the general verdict. We had occasion to consider this statute in Nudd v. Burrows, 91 U. S. 441, and see no reason to depart from the views there expressed. We said the section in question had its

origin in the code enactments of many of the States, and was intended to relieve the legal profession from the burden of studying and of practising under the two distinct and different systems of the law of procedure in the same locality, one obtaining in the Courts of the United States, the other in the Courts of the State; but that it was not intended to fetter the Judge in the personal discharge of his accustomed duties, or to trench upon the common law powers with which in that respect he is clothed." * * * *

"Where a State law, in force when the act was passed, has abolished the different forms of action, and the forms of pleading appropriate to them, and has substituted a simple petition or complaint setting forth the facts, and prescribed the subsequent proceedings of pleading or practice to raise the issue of law or fact in the case, such law is undoubtedly obligatory upon the Courts of the United States in that locality. There may be other things, not necessary now to be specified, with respect to which it is also binding. But where it prescribes the manner in which the judge shall discharge his duty in charging the jury, or the papers which he shall permit to go to them in their retirement, as in Nudd v. Burrows, or that he shall require the jury to answer special interrogatories in addition to their general verdict, as in this case, we hold that such provisions are not within the intent and meaning of the act of Congress, and have no application to the Courts of the United States. These are all matters relating merely to the mode of submitting the case to the jury. The conformity is required to be "as near as may be"—not as near as may be possible, or as near as may be practicable. This indefiniteness may have been suggested by a purpose: it devolved upon the judges to be affected the duty of construing and deciding, and gave them the power to reject, as Congress doubtless expected they would do, any subordinate provision in such State Statutes which, in their judgment, would

unwisely encumber the administration of the law, or tend to defeat the ends of justice in their tribunals." * * *

"The motion for a new trial should have been granted in the Court below."

"In the Courts of the United States, such motions are addressed to their discretion. The decision, whatever it may be, cannot be reviewed here. This is a rule of law established by this Court, and not a mere matter of proceeding and practice in the Circuit and District Courts. Henderson v. Moore, 5 Cranch 11; Boswell v. De la Lanza, 20 How. 29; Schuchardt v. Allen, 1 Wall. 371. It is, therefore, not within the act of Congress of June 1, 1872, and cannot be affected by any State law upon the subject."

In the case of Butler v. Young, 5 C. L. N. 146, the Court, Judge Sherman, says:

"The word 'practice' means the rules adopted by every Court to facilitate the transaction of the business before it in a proper and orderly manner. Sometimes these rules are printed and called 'rules of practice;' sometimes they are embodied in statutes, but perhaps as frequently they are unwritten, but well-known and recognized by the bar and enforced by the Court. No construction should be given to the statute that will in any manner change, alter or add to the jurisdiction of the Federal Courts, or *deprive any suitor in those Courts of any substantial* right conferred upon him by any act of Congress. Substantive rights given by the State laws should not be confounded with what is mere practice in the State Courts."

This statute of New Jersey is not a mere matter regulating the practice in their Courts. It actually deprives a party in some instances of a substantial right which he would otherwise enjoy. Suppose the Legislature of any State should abolish all appeals and writs of error entirely, would it be held that

such provision could deprive a suitor in a Federal Court of his right to remove his cause by writ of error to this Court?

We think it clear, therefore, that the act of Congress in question was never intended to adopt, for the government of the Courts of the United States, any State law which would deprive a party, without his consent and against the will of the Court before whom the cause was tried, *of the substantial right, guaranteed to him by another law of Congress*, of having his case re-examined and reviewed in the highest tribunal of the country.

Numerous cases have occurred in which this Court has entertained writs of error and decided causes upon exceptions taken at the trial which have been thus brought here after a rule to show cause had been granted and argued and a new trial denied by the Court below.

Among these cases are the following:

Henderson v. Moore, 5 Cranch 11.
Boswell v. De Langa, 20 How. 32.
Schuchardt v. Allen, 1 Wall. 371.
Laber v. Cooper, 7 Wall. 571.
Indianapolis R. R. Co. v. Horst, 93 U. S. 291, 301.
Newcomb v. Wood, 97 U. S. 583.
Brooklyn v. Ins. Co., 99 U. S. 366.
Railway Co. v. Twombley, 100 U. S. 78.
Railway Co. v. Hick, 102 U. S. 120.

We humbly submit, therefore, that upon neither ground should the motion of the defendant in error in this case prevail.

JNO. LINN,
Atty. of Plff. in Error.

12414 108-564

IN THE SUPREME COURT OF THE UNITED STATES.

THE NEW JERSEY ZINC COMPANY,

vs.

CHARLES W. TROTTER.

On motion to dismiss Writ of Error and affirm judgment in the Circuit Court of the United States for the District of New Jersey.

BRIEF IN REPLY.

CORTLANDT PARKER,
RICHARD WAYNE PARKER,
Of Counsel with CHARLES W. TROTTER,
Respondent.

NEWARK, N. J.:
WARD & TICHENOR, LAW CASE PRINTERS, 832 & 834 BROAD ST.
1883.

Supreme Court of the United States.

THE NEW JERSEY ZINC COMPANY.

vs.

CHARLES W. TROTTER.

On motion to dismiss Writ of Error and affirm judgment in the Circuit Court of the United States, for the District of New Jersey.

BRIEF IN REPLY.

1. *Motion to dismiss because the writ of error brings up a judgment at law in trespass for damages for less than $5,000.*

2. *Motion to affirm because a general rule nisi for new trial was taken in the Court below, and by the State practice and statutes of New Jersey, as adopted by said Court, the obtaining of such rule is ipso facto a waiver of all the exceptions relied on by the appellant, and there is nothing before the Court that can be alleged for error.*

I. BRIEF IN REPLY ON MOTION TO DISMISS.

All that is claimed in the suit, or that was or could be awarded or recovered by the judgment, was damages, and these were not over $5,000. These were the *matter in dispute*, and the only matter so in dispute; the only matter directly and finally recovered by the judgment. This is admitted by the briefs on both sides.

The title to the *locus in quo*,—the place where the trespass was committed, is said to have come into discussion in the evidence in order to determine whether or no there was a trespass. But it was only material evidence for that purpose. The matter in dispute is the trespass. The plea was the general issue. There was no plea of title. The determination is the existence of the trespass

and the money damage thereby done. This only was in dispute *in the cause.*

The only way in which this judgment can affect title is incidentally by way of estoppel in other actions between the same parties. The case cited in the original brief of *Elgin* vs. *Marshall*, as just decided, is conclusive that such ideidental results of a trial are not the matter in dispute, and that in a judgment for money the amount of money, the nominal or apparent sum or amount of the judgment appealed from, is the amount in dispute.

Affidavits therefore as to the value of the mine were not properly taken. The cases cited by the appellant's brief in which such affidavits were allowed, were an action to recover dower in land, a claim to land as fraudulently conveyed, and an action in replevin. In each case specific property was to be recovered.

II. AS TO WAIVER OF EXCEPTIONS.

No answer is made to our insistments.

1. That a motion for new trial and the rule *nisi* therefor taken and served, are matter of practice in the Court below and not here, and a form or mode of proceeding.

2. That since the act of 1872, Rev. Stat. U. S., § 914, that practice must conform to the practice of New Jersey.

3. That by the practice of New Jersey the taking of a general rule *nisi* for new trial is *ipso facto* a waiver by the party of all exceptions, unless they be specially reserved by the rule.

4. That a general rule *nisi* without such reservation, was taken in the cause and all exceptions were thereby waived by the act of the party.

The New Jersey Statute of 1875, re-enacting a long settled rule, is here repeated:

"*Where the party holding a bill or bills of exceptions,*
"*applies for a rule to show cause why a new trial should*
"*not be granted, the granting thereof* SHALL BE A WAIVER
"OF ALL BILLS OF EXCEPTIONS EXCEPT ON POINTS
"EXPRESSLY RESERVED IN SAID RULE."

It is no answer to our reasoning to say that a writ of error is a writ of right of which the party cannot be deprived by State statute. No one denies that. But State statute does govern the practice and forms before that writ is taken, including the entry of rules and orders, and may provide that the entry of a general rule shall waive exceptions.

This statute takes away nothing from the right of the party or the discretion of the Judge. The party may reserve exceptions from his motion for new trial specially. The Judge has full discretion so to do when the bill is granted. The statute governs merely the form or mode of proceeding, making it necessary to reserve exceptions specially.

Again, it is no answer to say that at common law and by the practice of other circuits, on a motion for new trial, exceptions may be required to be waived on the record, and that unless so waived they remain. (Appellant's brief, p. 4, citing *U. S.* vs. *Hodge*, 6 How., 279.)

Our contention is that the practice of New Jersey is different from that of other circuits, and that there, as matter of practice, exceptions must be specially reserved on the record, instead of specially waived.

Nor is it any answer to refer to cases as to State practice before 1872, when the State law had no influence, unless adopted by rule of Court, which is the purport of *U. S.* vs. *Breitling*, 20 How., 254.

Nor is it material that the power and discretion of the Judges of the United States are not within State statutes, whether in the matter of his charges to a jury, or his discretion in granting new trials, &c. No attempt is made to fetter his discretion. He may reserve exceptions to a party or not as he may please. We claim affirmance because of the act of the *party*, who by taking a general rule *nisi*, has *ipso facto* waived exceptions.

Nor is it material to tell us that error does not lie to the discretion of the Judge in a motion for new trial. This is long settled law.

But we insist, that in all rules of practice, that is rules governing the action of parties in Court, the State statute must govern, and that where by State statute the taking of a general rule *nisi* in the State Court waives exceptions as matter of practice, it does the same in the United States Court.

The statute of 1872, is being applied sternly by this Court. At this very term it was held that the provisions of the State code of Colorado granting as of right one new trial to each party in actions of ejectment, is binding on the Courts of the United States (*Equator Mining Company* vs. *Hall*, No. 55, 1882) 106 U.S. 86

This case comes much nearer the discretion of the Judge than ours, in which his discretion is carefully reserved.

Analogous construction to that now insisted on has been given to the act of 1824, as to Courts of the United States in Louisiana, enacting "that the mode of proceeding in "civil causes shall be conformable to the "laws directing the mode of practice in the district "courts of said State."

This act makes lawful a summary judgment without jury trial, (9 Peters, 166.) It is held to make it necessary that sales of land should be advertised in the parish. (11 Wallace, 416.)

It controls the time when a judgment shall be considered to have been rendered for the purpose of appeal to this Court. By Louisiana law a judgment is not held to be rendered till it is *actually* signed by the Judge, and a writ of error to a judgment for less than $5,000, which had been given before May 1st, 1875, but not actually signed till May 10th, was dismissed for want of jurisdiction. 93 U. S., (3 Otto, 235.)

Both the adoption of State practice and the particular rule in question tend to simplify and shorten litigation and vexatious appeals, and should be favored by this Court.

CORTLANDT PARKER,
RICHARD WAYNE PARKER,
For Charles W. Trotter.

108-566

OFFICE SUPREME COURT U. S.
FILED
OCT 9 1882
JAMES H. MCKENNEY, CLERK

Supreme Court of the United States.

No. 4 Original, October Term, 1882.

EX PARTE, THE BALTIMORE AND OHIO RAILROAD COMPANY, PETITIONER.

Application for a Writ of Mandamus.

BRIEF FOR RELATOR.

JOHN H. B. LATROBE,
JOHN K. COWEN,
E. J. D. CROSS,
Of Counsel for Relator.

ISAAC FRIEDENWALD, PRINT., BALTIMORE.

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Supreme Court of the United States.

No. 4 Originals, October Term, 1882.

EX PARTE, THE BALTIMORE AND OHIO RAILROAD COMPANY, PETITIONER.

APPLICATION FOR A WRIT OF MANDAMUS.

BRIEF FOR RELATOR.

The petition filed by the relator states that on the 20th day of April, 1881, Jeanette Maxon, as owner of a certain barge called "J. J. Munger," and Wm. M. Force and others, as owners of a cargo of corn on board said barge, exhibited in the District Court of the United States for the District of Maryland, their joint libel against the Baltimore and Ohio Railroad Company in a cause of collision, civil and maritime.

Libellants alleged that on March 22d, 1881, said barge, loaded with a cargo of corn, while in the harbor of Baltimore, and lying at a certain wharf, was injured by a steamer called "The Knickerbocker," then in the employ of the Railroad Company.

The libellants alleged also that the collision was the result of negligence on the part of the steamer, or those having the control thereof; and prayed that a decree be

entered by the District Court for the amount of $6000, the damages alleged to have been suffered by them by reason of the collision.

The Railroad Company filed its answer, denying that the collision was the result of negligence on the part of the steamer. Proof was taken, and on June 24th, 1881, the Hon. Thomas J. Morris, Judge of the District Court, rendered a decree in favor of the libellants against the Railroad Company to the amount of $1471.20 in favor of Jeanette Maxon, and in favor of Wm. M. Force and others in the sum of $3907.13 with interest. From this decree an appeal was taken to the Circuit Court of the United States for the District of Maryland, where the decree of the District Court was affirmed.

An appeal was prayed to this Court on March 3d, 1882, and refused on March 22d, 1882.

The Railroad Company then filed its petition in this Court, praying that a rule might be laid upon the Hons. Hugh L. Bond and Thomas J. Morris, the Judges of the Circuit Court, requiring them to show cause why a mandamus should not issue requiring them to allow an appeal in said cause.

The decree from which the appeal is prayed, and the order of Court thereon, are filed with the petition (pp. 5, 7).

Counsel for the relator respectfully submit that the writ of mandamus should be allowed.

The statute granting appeals is as follows:

An appeal shall be allowed to the Supreme Court from all final decrees of any Circuit Court . . . . . where the matter in dispute

exceeds the sum or value of two thousand dollars; and the Supreme Court is required to receive, hear and determine such appeals.

Revised Statutes, sec. 692.

By Act of February 16, 1875, this amount was changed to five thousand dollars.

Sup. to Rev. Statutes, p. 136.

The decree from which appeal was prayed was that the Railroad Company should pay to Jeanette Maxon $1471.20, to Wm. M. Force and others, trading as J. & C. Moore & Co., $3907.13, each sum being less than the jurisdictional amount, but aggregating $5378.33.

The sole question then is: Does the matter in dispute, as far as the relator is concerned, exceed the sum or value of $5000?

The matter in dispute is the subject in litigation or controversy. In the proceedings in the District Court the libellants sought to hold the railroad company responsible in a certain sum. As far as they were concerned, the sum which each claimed was the matter in dispute as to them. Should they, or either of them, have prayed an appeal, the test of jurisdiction would be the amount each claimed. They were concerned or interested in the controversy to that amount.

When the defendant prayed an appeal, the *matter in dispute*, as to it, was as to amount, the sum it was decreed to pay. To this extent it was interested in the litigation. Its liability under the decree passed against it is what it seeks the revisory action of this Court upon; that liability was what it was decreed to pay, viz. $5378.33.

Does the fact that the decree was that the defendant should pay $1471.20 to Jeanette Maxon, and $3907.13 to the firm of J. & C. Moore & Co., make the matter in dispute

as far as the defendant is concerned any other than the sum of $5378.33? Is not this sum the measure of its interest in the controversy? It disputes the decree as an entirety. It is interested in the controversy to this extent. Does it not therefore come within the terms of the statute?

The amount of the single claim of either of the complainants is not the matter in dispute from the standpoint of the defendant, but the claims of both as ascertained and settled by the decree.

The decisions of this Court upon this subject naturally divide into two classes, according to the attitude of suitors who are appellants.

The *first* class is composed of appellants whose claims or liabilities singly do not equal the jurisdictional amount, yet when aggregated exceed it. The uniform decision of this Court has been that an appeal will not lie, for the reasons that the matter in dispute is confined to the claim of each appellant, is distinct and cannot be consolidated with the demands of others. The cases most frequent have been seamen claiming wages, salvors for salvage, and creditors with distinct claims against a fund or party. The principal cases upon this class are:

Stratton *vs.* Jarvis & Brown, 8 Peters, 8.
Rich *vs.* Lambert, 12 Howard, 347.
Seaver *vs.* Bigelow, 5 Wall. 208.
Terry *vs.* Hatch, 93 U. S. 44.
Paving Co. *vs.* Mulford, 100 U. S. 147.
Chatfield *vs.* Boyle, Oct. T. 1881.

The *second* class is composed of defendants who have been sued by parties whose claims singly do not equal the jurisdictional amount, yet when a decree has been rendered awarding to complainants sums collectively equal to the jurisdictional amount, it has been held that an appeal will lie.

In the case of Shields *vs.* Thomas, 17 How. 3, Chief-Justice Taney draws this distinction. The bill was filed by certain distributees of an estate to recover sums alleged to be due them. The sum allotted to each party was less than $2000, but the decree in favor of complainants was for a greater sum. The motion to dismiss was upon the ground that the sum due to each complainant was severally and distinctly decreed to him, and that the amount thus decreed was the sum in controversy between each representative and the appellant, and not the whole amount for which he had been held liable. But the Court held that :

> So far as the appellant is concerned, the entire sum found due by the Kentucky court is in dispute. He disputes the validity of that decree, and denies his obligation to pay any part of the money. And if the appellees maintain their bill, he will be made liable to pay the whole amount decreed to them. This is the controversy on his part, and the amount exceeds two thousand dollars. We think the Court, therefore, has jurisdiction on appeal.

In the case of Paving Co. *vs.* Mulford, 100 U. S. 147, the judgment could only have been several against each defendant. The Chief Justice states the general doctrine to be :

> In such cases the appeal of each defendant must stand or fall according as his own interest exceeds or falls short of our jurisdictional amount.

In the case of Market Co. *vs.* Hoffman, 101 U. S. 112, the bill was originally filed by Hoffman against the Market Company, praying that the Company should be enjoined from selling the complainant's butcher stall. A large number of parties claiming to be entitled to other stalls were subsequently made parties complainant. The court below passed a decree which enjoined the Company from

selling the stalls. Upon the question of jurisdiction the Court held:

The first question to be determined is whether the amount in controversy is sufficient to give us jurisdiction of the appeal. Upon this we have no doubt. While it may be true that if Hoffman was the sole complainant, the amount in controversy would be insufficient to justify an appeal either by him or the Company, the case is one of two hundred and six complainants suing jointly. The decree is a single one in favor of them all, and in denial of the right claimed by the Company, which is of far greater value than the sum which by the Act of Congress is the limit below which an appeal is not allowable. It is averred under oath in the pleadings that the sale which the Company proposed to make, and the court enjoined, would have realized to the Company more than $60,000. Of this benefit the decree deprives them. It is very plain, therefore, that the appeal is one within our jurisdiction.

To the same effect is the case of Corbin *vs.* County of Black Hawk, October Term, 1881. The bill was filed by Corbin against the County, its Auditor and Treasurer, and a number of individuals, for the specific performance of contracts of sale of school lands. Mr. Justice Blatchford, in delivering the opinion, says:

The first point taken by the appellees is that the appeal ought to be dismissed for want of jurisdiction in this Court, on the ground that the matter in dispute does not exceed the sum or value of $5000, exclusive of costs. The view urged is, that the interest of each of the appellees, who is alleged to have an interest in some of the lands in question, is several; that each several interest is not shown to exceed the value of $5000, and that the county of Black Hawk and its officers are not necessary or more than formal parties to the suit. But the allegations of the bill, which must be taken as true for the purposes of this case, are, that although, under the contracts, the patents for the lands are to be issued by the Governor of the State, the notes and amounts due thereon are held by the county. The money is to be paid to the county, and the tender was made to the officers of the county, who are defendants. The matter in dis-

pute between the appellant and the county is the sum of $16,197.69, which he tendered to its officers, and which they did not accept. Under the contracts the purchaser is entitled to receive a patent from the Governor only on paying the notes which are alleged to be held by the county. To obtain the relief asked for in the bill, the plaintiff must first pay the said sum to the county in discharge of said notes. His title cannot be quieted as prayed for as against the adverse claimants of the land until his contract obligations to the county are fulfilled. Therefore, the county and its said officers are real parties, and the matter in dispute as to them is the sum so tendered.

We submit that the decision of this Court, rendered at the last term on the motion to dismiss the appeal in the case of "The Mamie," or as entitled on the docket, *Parcher et al. vs. Cuddy*, No. 1114, is conclusive of the present question. There the liability sought to be enforced against *Parcher et al.* as owners of the yacht Mamie, was the claims of a number of parties who each claimed $5000. Each single claim could not give jurisdiction, but collectively they would. The Chief Justice held that the matter in dispute was the "full amount of all the claims against the owners of the Mamie in the several suits which it was the object of this proceeding to defeat, as against anything else than the boat or her value. This, according to the showing now made, is largely in excess of $5000."

Phillips' Practice, (ed. 1878) p. 93.
Rodd vs. Heart, 17 Wall. 355.

In the case of Oliver vs. Alexander *et al.*, 6 Pet. 143, the appeal was from *separate* and *several* decrees under separate libels awarding various sums to seamen for wages. The Court held the claims to be separate and

distinct, and that there could only be an appeal from a decree for a sum under the jurisdictional amount.

JOHN H. B. LATROBE,
JOHN K. COWEN,
E. J. D. CROSS,
of Counsel for Relator.

108-566

OFFICE SUPREME COURT
FILED
APR 15 1882
JAMES H. MCKENNEY

Supreme Court of the United States.

No. 14 Originals. October Term, 1881.

EP-PARTE, IN THE MATTER OF

THE BALTIMORE AND OHIO RAILROAD COMPANY,

PETITIONER.

APPLICATION FOR A WRIT OF MANDAMUS.

BRIEF FOR RELATOR.

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BRIEF FOR RELATOR.

Counsel for the relator respectfully submit the following argument why the writ of mandamus prayed for should be allowed.

The statute granting appeals is as follows: "An appeal shall be allowed to the Supreme Court from all final decrees of any Circuit Court . . . . where the matter in dispute exclusive of costs exceeds the sum or value of two thousand dollars; and the Supreme Court is required to receive, hear and determine such appeals."

Revised Statutes, sec. 692.

This amount was changed by Act February 16th, 1875, to five thousand dollars.

Sup. to Rev. Stats., p. 136.

The sole question then is: Does the matter in dispute, as far as the relator is concerned, exceed this sum or value?

The matter in dispute is the subject in litigation or controversy. As far as the complainants are concerned, it was what each claimed. As to the defendant, it was what was claimed of it, and was as to amount, what it was decreed to pay.

In the case of *Shields* vs. *Thomas*, 17 Howard, 5, C. J. Taney, upon the motion to dismiss, draws this distinction: "So far as the appellant is concerned, the entire sum found due by the Kentucky Court is in dispute. He disputes the validity of that decree, and denies his obligation to pay any part of the money. And if the appellees maintain their bill, he will be made liable to pay the whole amount decreed to them. This is the controversy on his part; and the amount exceeds two thousand dollars. We think the Court, therefore, has jurisdiction on the appeal."

This distinction, we think, has been recognized in the cases in this Court.

In *Oliver* vs. *Alexander et al.*, 6 Pet. 143, there was a separate and several decree in each case, determining each seaman's claim. Each claim was independent.

In this case the libel was for the loss of vessel and cargo. The libel was in effect against the steamer Knickerbocker, for alleged negligence by which both the vessel and cargo were injured. There could have been no recovery for one unless for the other.

In *Rich* vs. *Lambert*, 12 How., 347, the owners of the different portions of the cargo were held to have had separate and distinct interests. This distinction was recognized by Justice Nelson in *Seaver* vs. *Bigelows*, 5 Wall. 208. In which last case the appeal was by a party whose judgment was under the jurisdictional amount, which is not, however, the case before the Court.

So in *Paving Company* vs. *Mumford*, 100 U. S. 147, the judgment could only have been several against each defendant. In that case the Chief Justice says: "In such cases the appeal of each separate defendant or complainant must stand or fall according as his own interest in the controversy exceeds or falls short of our jurisdictional amount." We submit that the *interest* of the relator in the decree, from which an appeal is now sought, exceeds the jurisdictional amount.

In the case of *Parcher et al.* vs. *Cuddy*, No. 1,114, of the present term, the Court held that the value of the matter in dispute was the "full amount of all the claims against the owners of the Mamie in the several suits which it was the object of this proceed-

ing to defeat, as against anything else than the boat or her value. This, according to the showing now made, is largely in excess of $5,000."

In that case the separate claims were those of the administrators, each of which was under the jurisdictional amount. So in the present case, the claims respectively of the owners of the cargo and vessel, dependant as they were upon the relator's liability for the alleged tort, were each under the required amount, but in the aggregate, as in the case of the "Mamie" exceeded it.

It has been the confidence of the relator's counsel in the applicability of the case of the "Mamie" to the case at bar that has had its influence upon them in filing the present petition. The distinction there made between those cases, in which the amount of the claim settles the jurisdiction, and those in which the liability of the defendant, growing out of the subject matter in dispute, equals the sum of the claims, is recognized in Mr. Phillip's Practice, which, although not offered as authority, may be referred to as having its effect upon our views on this question.

Phillips' Practice, p. 93, last edition.

JOHN H. B. LATROBE,
JOHN K. COWEN,
E. J. D. CROSS,

Of Counsel for Relator.